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THE LAW OFFICER AS A TRIAL JUDGE

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THE LAW OFFICER AS A TRIAL JUDGE

A Thesis

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The opinions and conclusions expressed here are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School or any other governmental agency. References to this study should include the foregoing statement.

by

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SCOPE:

A study and comparison of the duties and functions of the law officer and the Federal district judge; powers inherent in the office of a Federal judge concerning which the Code and Manual are silent; and extent to which such powers inhere in the law officer.

CONTRIBUTION

Prior to the enactment of the Uniform Code of Military Justice, officers of the armed forces, engaged in military justice, had only occasional need to be concerned with Federal Rules of Criminal Procedure. Since the passage of the Code, these same officers have been sporadically exposed to the federal Rules; the U. S. Court of Military Appeals and boards of review have occasionally alluded to them.

The contents of this thesis have indicated that a law officer has far broader powers than contemplated originally by military officers and the framers of the Manual for Courts Martial, 1951, and that there are still areas in which the law officer may be even more equated to a federal judge. Although this study is not all inclusive due to the magnitude of the subject, law officers may be hereby briefed on their current powers and alerted as to future possibilities.

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CHAPTER I

INTRODUCTION

The framers of the Uniform Code of Military Justice[1] told the Congress during hearings that their intention was to make the law officer before a general court-martial like the judge of a federal court.[2] In enacting the Code, it would seem that Congress intended that he should serve like a judge, wherever possible, taking into consideration the procedural differences between the two systems.

The United States Court of Military Appeals quickly recognized the existence of the Congressional intent and, at an early date, directed to it the attention of both law officers and those authorities reviewing general courts-martial.[3] There has resulted a steady flow of decisions which have equated the law officer to the federal judge in several instances.[4] This study will be concerned with a comparison of the powers exercised by the judge of a federal district court in criminal cases with those of a law officer in a general court-martial to note similarity, variance, and avenues through which the law officer may find additional powers.

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1 Act of 5 May 1950, 64 Stat. 107; 50 U.S.C. 551, codified by the Armed Forces Act, 10 U.S.C. 801 et seq., hereafter referred to as the Code or UCMJ

2 Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, on H.R. 2498, 81st Cong., 1st Sess., p. 1153 (1949)

3 United States v. Berry, 1 USCMA 235, 2 CMR 141 (1952)

4 United States v. Keith, 1 USCMA 493, 4 CMR 85 (1952)
United States v. Jackson, 3 USCMA 646, 14 CMR 64 (1954)
United States v. London, 4 USCMA 90, 15 CMR 90 (1954)
United States v. Stringer, 5 USCMA 122, 17 CMR 122 (1954)
United States v. Allbee, 5 USCMA 448, 18 CMR 72 (1955)

For a better understanding of the two systems, the following chapter will be devoted to comparing the general court-martial procedure with that of a federal district court in criminal cases.

CHAPTER II

COMPARISON OF FEDERAL DISTRICT COURT PROCEDURES WITH THOSE OF COURTS-MARTIAL

GENERAL Both the federal district court and the court-martial derive their powers from the U. S. Constitution, but through different Articles. The U. S. Constitution authorizes the Congress to establish courts inferior to the Supreme Court,[5] pursuant to which, district courts having been established.[6] Although the U. S. Constitution empowers the Congress to raise and support the armed forces,[7] their management and employment is under the President as the Commander in Chief.[8] Consequently, a district court is part of the judicial branch of the government, whereas a court-martial is administered through the executive. Nevertheless, both dispense justice in criminal proceedings.

Since courts-martial serve in assisting the Executive Department of the Government in maintaining discipline in the armed forces, they are subject to certain limited administrative directives of the superior authority appointing the court. As an example, courts-martial are without authority to try a particular case unless the authority appointing the court so directs. Federal courts, as a part of the judiciary, have no system which is a counterpart. Notwithstanding executive administration, there is a striking similarity between federal criminal procedures and those of a court-martial.

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5 U. S. Const., Art. III, Sec. 1
6 18 U. S. C. 3231
7 U. S. Const., Art. I, Sec. 8, cl. 14
8 U. S. Const., Art. II, Sec. 2

Powers of a federal district judge and powers of a law officer are closely connected with, and often dependent upon, procedural rules. So for one who is unfamiliar with either the federal criminal or general court-martial proceedings, there follows a brief review of both for a better understanding of material to be discussed later. Special provisions, such as waiver of a certain procedure, for instance, will not be discussed for the purpose of simplicity.

FEDERAL DISTRICT COURT Consider the defendant who is to appear before a federal district judge in a jury trial. He may be arrested either before[9] or after[10] indictment. If arrested prior to indictment, he is taken before a commissioner where he is warned that he does not have to make a statement, is given the opportunity to be represented by counsel, and granted a preliminary hearing to determine whether or not there is probable cause for holding him.[11] If the determination is in the affirmative, the commissioner sets the defendant free on bail or commits him to jail.[12] The court refers the matter to a grand jury which indicts the defendant.[13] The case is then referred to the district court.[14] However, if the indictment precedes the defendant's arrest, he nevertheless appears before the commissioner for commitment or to have bail set.[15] The defendant then appears before the district judge for arraignment,[16] at which time he is entitled to

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9 Federal Rules of Criminal Procedure, Rule 4
10 Federal Rules of Criminal Procedure, Rule 9
11 Federal Rules of Criminal Procedure, Rule 5
12 Ibid.
13 Federal Rules of Criminal Procedure, Rules 6 and 7
14 Federal Rules of Criminal Procedure, Rule 6(f)
15 Federal Rules of Criminal Procedure, Rule 9
16 Federal Rules of Criminal Procedure, Rule 10

counsel of his own choice, or, in the absence of the financial ability to obtain counsel, he is entitled to have counsel appointed for him as a matter of right.[17] At this time, motions are heard,[18] he is arraigned,[19] and he is called upon to plead to the indictment.[20] The judge then sets the date for hearing the case. At the trial, the jury is selected and sworn.[21] The judge determines the merit of challenges for cause. The government presents its case followed by that of the defendant. The judge instructs the jury on the law of the case,[22] after which the jury retires to consider its verdict. The jury may find the defendant not guilty, guilty of the offense charged, or guilty of a lesser offense included within the offense charged.[23] The verdict must be unanimous.[24] After the verdict, the judge may, but is not required to, postpone sentence pending receipt of a report from the court's probation service concerning the defendant's background.[25] The judge sentences the defendant.

GENERAL COURT-MARTIAL An accused, the military term applied to a defendant, who is to appear before a general court-martial may or may not be taken into custody, dependent upon the circumstances.[26] He may be placed in confinement if necessary to assure his presence

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17 Federal Rules of Criminal Procedure, Rule 43
18 Federal Rules of Criminal Procedure, Rule 12
19 Federal Rules of Criminal Procedure, Rule 10
20 Federal Rules of Criminal Procedure, Rule 11
21 Federal Rules of Criminal Procedure, Rule 24
22 Federal Rules of Criminal Procedure, Rule 30
23 Federal Rules of Criminal Procedure, Rule 31
24 Ibid.
25 Federal Rules of Criminal Procedure, Rule 32
26 Art. 10, UCMJ

at the trial;[27] or he may be retained in a status of arrest, strictly a military term defined as a moral restraint to a certain limited geographical area,[28] violation of which would give rise to an additional charge.[29] Therefore, restriction of his movements is usually determined by his commanding officer or superior authority.[30] Any person subject to the Code, who has personal knowledge or who has made a preliminary inquiry concerning the facts relating to the offense, signs sworn charges, a statement of the offense against the accused.[31] An officer is next appointed to investigate impartially the charges to determine the truth of the matter set forth.[32] The accused is entitled to be present at the investigation, to be represented by counsel, to examine witnesses, and to testify in his own behalf. The investigating officer's report is referred to the superior who has authority to convene the general court-martial.[33] The file is reviewed by the staff judge advocate for the convening authority; the latter then refers the case to trial[34] before a court whose members are appointed by him. Contrary to the federal procedure, all parties to the general court-martial trial, i.e. law officer, court members, and counsel, must be sworn in the presence of the accused.[35] The latter is entitled to counsel, either appointed or of his choice.[36] The members of the court, not the law officer,

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27 Art. 13, UCMJ
28 Art. 10, UCMJ
29 Art. 95, UCMJ
30 par. 22, MCM. 1951
31 Art. 30, UCMJ
32 Art. 32, UCMJ
33 Art. 33, UCMJ
34 Art. 34, UCMJ
35 Art. 42, UCMJ
36 Art. 27, UCMJ

determine the merit of challenges for cause.[37] The accused is arraigned,[38] motions are heard,[39] and he is required to plead.[40] The prosecution presents its case followed by that of the accused. Prior to considering the findings, the law officer instructs the court on the law of the case.[41] The members of the court, exclusive of the law officer and counsel, determine the findings,[42] which may be either guilty, not guilty, or guilty of an offense lesser included within that charged.[43] Lack of a requirement that the finding be unanimous prevents a hung court. It proceeds to hear data concerning the accused which usually is available without the necessity of a postponement.[44] The court members then determine the sentence.[45]

COMPARISON From the above, a similarity is quite apparent between the federal and the military procedure; arrest by federal officers--arrest by the military; commitment by a commissioner--confinement by commanding officer; indictment by grand jury--investigating officer's report and staff judge advocate's advice; trial by jury--trial by court-martial members; motions, arraignment, pleas, and trial of issues are the same; instructions to the jury--instructions to the court members; verdict--finding; evidence of defendant's record---evidence of accused's record; sentenced by the judge---sentenced by the court members.

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37 Arts. 41, 51, 52, UCMJ
38 par. 65, MCM, 1951
39 par. 66 et seq., MCM, 1951
40 par. 70, MCM, 1951
41 Art. 51, UCMJ
42 Art. 39, UCMJ
43 Art. 51, UCMJ
44 par. 75, MCM, 1951
45 Art. 39, UCMJ

But a detailed analysis of the powers of a federal judge and a law officer will show even a greater similarity. Due to the unrelated nature of the subjects to be covered they must be grouped for the purposes of clarity and continuity. Therefore, as used in federal practice, they will be considered in relation to powers before trial of the issues, powers during the hearing on the issues, and powers during the presentencing procedure.

CHAPTER III

COMPARISON OF POWERS EXERCISED BEFORE TRIAL OF THE ISSUES

GENERAL The defendant, in a federal district court, appears before the judge, on a set date, for his arraignment, to make any motions, and to set forth his plea. Then, there usually follows the setting of a later date for the selection of jurors and trial of the general issues. But, in the military, once the accused appears before the court, the trial usually proceeds to finality, in the absence of any continuance for cause. Consequently, the term "trial" in the federal court would seem to mean that period commencing when the court meets to begin the selection of jurors and trial of the issues;[46] whereas in the military the word "trial" refers to the period commencing when the court first meets. In the military, contrary to the federal court, "trial" also includes: the swearing of the law officer, members of the court and counsel; consideration of challenges; hearing of motions; arraignment; and, pleas of the accused. Consequently, certain powers exercised by the judge of the federal district court prior to trial, i.e. at the arraignment, are exercised by the law officer during the trial in a general court-martial.

FEDERAL JUDGE The federal judge is appointed, sworn when he assumes his office, and thenceforth serves in his official capacity. He hears all cases brought before him. Prior to the trial on the issues, he hears the arraignment, motions, and pleas.[47]

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46 53 Am. Jur., Trial, Sec. 4
47 Federal Rules of Criminal Procedure, Rule 12

LAW OFFICER The law officer's existence depends upon his being so appointed by a convening authority[48] and lasts only so long as the order appointing the court remains in effect. Further, he cannot act in a particular case until the appointing authority has at least referred it to the court of which he is law officer. And lastly, his oath must be administered in each individual case in the presence of the accused.[49] Failure to do so is reversible error.[50] Both the Code and the Manual are silent as to his acting as a law officer in a particular case prior to the initial meeting of the court to hear that case. However, his limited power to act in any court-martial would seem to preclude his performing any substantial duties prior to the military trial itself. In this respect, the Manual, in discussing defenses and objections, provides that those capable of determination without the trial of an issue raised by a plea of not guilty may be submitted to the convening authority before trial or to the court during trial.[51] This provision, as expressed by the framers of the Manual, appears to substantiate the opinion that the law officer is relatively powerless to act prior to the court's first meeting; further, he is not under oath, a specific act required in each trial. There has been one notable case on the law officer's power before the court meets.

In United States v. Mullican, after the case had been referred to the court for trial, a conference, purportedly in accordance with

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48 Art. 22, UCMJ
49 Art. 42, UCMJ
50 ACM 5274, Pino, 6 CMR 543
ACM 7342, Welch, 12 CMR 820
51 par. 67, MCM, 1951

the Federal Rules of Criminal Procedure, Rule 12, was held in the presence of the law officer, both counsel, accused, and a reporter to determine the admissibility of and admit into evidence certain documents.[52] The conference was made a matter of record and defense counsel at the time specifically approved the hearing. The reviewing court stated that it neither approved nor disapproved the procedure but that a hearing of this type should be held during the course of the trial. The case was affirmed since: (1) defense counsel expressly approved the procedure, thereby not being in a position to complain upon review; (2) the conference was made a part of the record; (3) there was no prejudice; and (4) any other action by the reviewing court would be recognizing form over substance. It is believed that the law officer actually exceeded the power granted by Rule 12, Federal Rules of Criminal Procedure, which only applies to motions; he more approximately applied Rule 16, Federal Rules of Civil Procedure, which generally is not used in criminal cases. It is also believed that the difference between the federal and the military meaning of "trial" confused the law officer in this case. It would therefore appear from the Manual and this decision that a law officer, before the court actually first meets in a case, has practically no power, the affirmance in the Mullican case being considered an exception in view of the special procedure there employed. The outcome in the Mullican case does, however, suggest a useful procedure which might be considered beneficial.

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52 7 USCMA 208, 21 CMR 334 (1956)

This method would require a deviation from the trial procedure as outlined in the Manual.[53] Although there is no provision for its use, there also is nothing specifically prohibiting it. This system would merely involve the court-martial initially meeting without the court members. Those present should include all other parties, viz., the law officer, the trial counsel, the defense counsel, the accused, and the reporter. The trial would then commence as it does under the present trial guide. The reporter would be sworn, qualifications of counsel would be considered, there would be an opportunity given to object to counsel and the law officer for cause, and the oath would be administered to the law officer and counsel. Then the accused could be arraigned and motions heard in accordance with Rule 12;[54] but taking evidence on the merits, as in the Mullican case,[55] would be improper. Lastly the accused would be called upon to plead. Then the court members would assume their seats; there would follow an opportunity to challenge the members and the administration of their oath. This method merely rearranges the order of procedure now used and permits the absence of the court members during preliminaries. It would be useful when lengthy motions are to be made, sometimes requiring that the law officer continue the case for their proper consideration. As will be seen when considering motions, the law officer would in some instances have to present the factual issue raised by the motion to the court members for consideration. During the hearing on the motions and during their consideration by the law officer, the court members serve

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[53] App. 8a, MCM, 1951
[54] Federal Rules of Criminal Procedure, Rule 12
[55] United States v. Mullican, 7 USCMA 208, 21 CMR 334 (1956)

no useful purpose; in fact they may have a tendency to become irritable if arguments and delays are lengthy. It might be said that the challenge of the law officer or counsel for cause so as to require a recess would defeat this procedure; but no more so than as now under a similar challenge when the full court is present.

Certainly the Code does not prohibit this practice, and it would then be in conformance with the Federal Rules of Criminal Procedure, which, the Code states,[56] should be followed wherever possible. But following the federal practice might be considered as doing too much violence to the present Manual. The current trial guide is practically the same as that found in the Army Manual for Courts-Martial, 1949, which in turn is nearly the same as the 1928 Manual.[57] And when the present Manual was written, the framers did not have the numerous decisions of the Court of Military Appeals to follow regarding the role of the newly created law officer; previously he had been a court member. Undoubtedly the Manual could be changed to so provide for this method of commencing the trial.

MOTIONS

General. Special pleas and motions in federal and military courts have been abolished through the Federal Rules of Criminal Procedure[58] and the Manual[59] respectively, resulting in there now being only a motion for appropriate relief and a motion to dismiss. In the federal court, motions must be made in writing unless the judge permits

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56 Art. 36, UCMJ
57 A Manual for Courts-Martial, U.S. Army, 1928
58 Federal Rules of Criminal Procedure, Rule 12
59 par. 66, MCM, 1951

them to be made orally.[60] The Code is silent as to such a requirement, but the Manual states they may be made orally or in writing in a military court.[61] Invariably, the law officer hears motions orally.

Motions in the federal court. A motion for appropriate relief may be used to raise defenses and objections based upon defects which occurred while instituting the prosecution; they must be made before the plea is entered.[62] However, the court in its discretion may permit the making of a motion for appropriate relief a reasonable time after the plea.[63] Examples of this type of motions are those predicated upon faulty grand jury proceedings and defects in the indictment or information other than lack of jurisdiction or the failure to state an offense.[64] But the court may refuse to grant the motion if not timely made, eg. where the motion relates to a joinder of counts in the indictment[65] or indefiniteness of the indictment as to quantity and value.[66]

Motions to dismiss, in contrast with motions for appropriate relief, need not be made before the plea is entered[67] and are not waived if delayed until the trial.[68] Proper grounds for this type of motion are lack of jurisdiction, failure of the indictment to state an offense, former jeopardy, the statute of limitations, and immunity.[69] There is

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60 Federal Rules of Criminal Procedure, Rule 47
61 par. 67c., MCM, 1951
62 Federal Rules of Criminal Procedure, Rule 12 (b) (2)
63 Federal Rules of Criminal Procedure, Rule 12 (b) (3)
64 Cyc, Fed. Proc., Sec. 42,176
65 Smith v. United States, 180 F.2d 775 (D. C. Cir., 1950)
66 United States v. Nickerson, 211 F.2d 909 (7th Cir., 1954)
67 Federal Rules of Criminal Procedure, Rule 12 (b) (1)
68 Cyc. Fed. Proc., Sec. 42.165
69 Cyc. Fed. Proc., Sec. 42.166

even authority that the statute of limitations should be raised before trial unless relief is granted by the court to raise it later.[70] It is too late to raise it for the first time when making a motion to vacate sentence.[71]

Motions are heard and decided usually before trial, but in appropriate cases the judge may defer his decision until there has been a hearing on the general issues.[72] However, issues of fact in connection with defenses and objections shall be tried by a jury if a jury trial is required under the Constitution or an Act of Congress.[73] Factual issues connected with the statute of limitations and former jeopardy are examples of situations where this provision applies.[74]

Motions in the military. The Manual similarly allows motions for appropriate relief and for dismissal as in the federal procedure;[75] the provisions are patterned after Rule 12, Federal Rules of Criminal Procedure.[76] The Manual provides that any motion for appropriate relief predicated upon the faulty institution of court-martial proceedings must be made before the plea is entered, or it is waived.[77] However, as in the federal court, the law officer has discretion in granting relief from the waiver.[78] Also, similar to the federal court, motions to dismiss based upon lack of jurisdiction, failure of the specification to state an offense, double jeopardy, and the statute of limitations, may be raised before the plea, but they are

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70 United States v. Taylor, 207 F. 2d 437 (7th Cir., 1953)
71 Ibid.
72 Federal Rules of Criminal Procedure, Rule 12 (b) (4)
73 Ibid.
74 C. J. S., Criminal Law, Sec. 1132
C. J. S., Criminal Law, Sec. 1129
75 par. 66, MCM, 1951
76 Legal and Legislative Basis, MCM, 1951, p. 82
77 par. 67b., MCM, 1951
78 Ibid.

not waived if the motion is delayed until later in the trial.[79]

Motions are heard during the trial but before the plea is entered; however, the law officer may defer his ruling on motions relating to defenses or objections until a later time.[80] The Manual provides that a decision on a motion is an interlocutory matter.[81] It goes on to state that if the motion raises a contested issue of fact which should properly be considered by the court in determining the guilt or innocence of the accused, receipt of evidence may be deferred until evidence on the general issue is introduced.[82] This last provision was inserted in the Manual due to the contents of Rule 12 (b) (4). To be specifically noted, because of later discussion, is the language used in Rule 12 (b)(4)[84] which states, "A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an Act of Congress", and the language in the Manual which states,

> "A motion raising a defense or objection will be determined at the time it is made unless the court defers action on the motion until a later time.... If the motion raises a contested issue of fact which should properly be considered by the court in connection with its determination of the accused's guilt or innocence, the introduction of evidence thereon may be deferred ... "[85]

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79 par. 67a., MCM, 1951
80 par. 67e., MCM. 1951
81 Ibid.
82 Ibid.
83 Federal Rules of Criminal Procedure, Rule 12 (b)(4)
84 Ibid.
85 par. 67e., MCM, 1951

United States v. Crnelas was the first case to consider issues of fact on a motion which had to be decided by the court members.[86] The accused had made a motion to dismiss the case due to lack of jurisdiction. Evidence showed that the armed service concerned possessed records showing that Crnelas had absented himself, whereas he himself testified to facts tending to show that he had not been actually inducted. The law officer overruled the motion. At the conclusion of the trial, the defense requested that the factual issue of whether or not the accused was a member of the service be submitted to the court. The request was denied. The U. S. Court of Military Appeals held that the law officer erred in resolving the issue of fact. He should have submitted it to the court members under appropriate instruction. The U. S. Court of Military Appeals noted that the Manual provides, "A decision on such a motion is an interlocutory matter",[87] and distinguished it from interlocutory questions which are finally decided by the law officer in accordance with the Code.[88] Further, the opinion quoted the sentence in the Manual concerning the deferral of receiving evidence on the motion when it relates to guilt or innocence.[89] Then in the very next sentence of the opinion the court stated, " ... there may be issues of fact involved in a defense or objection which should be dealt with by members of the court." (Underscoring supplied) Thus it appears that the court used interchangeably the guilt or innocence Manual language and the

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[86] 2 USCMA 96, 6 CMR 96 (1952)
[87] par. 67e., MCM, 1951
[88] Art. 51(b), UCMJ
[89] par. 67e., MCM, 1951

defense or objection language in Rule 12(b)(4). It is believed that there is a distinct difference between the two, since a fact pertaining to a defense or objection does not necessarily relate to guilt or innocence. The Court also concluded that uncontested issues of fact need not be submitted to the court, and the law officer can rule finally on the law involved in such a motion. Finally to be noted, because of the comparison of this case with the language contained in others, is the fact that the opinion was written by Chief Judge Quinn.

The next case, United States v. McNeill,[90] also involved a jurisdictional question. The opinion, written by Judge Latimer, concluded that the accused as a matter of law was a member of the service, thereby precluding the need for the law officer submitting any factual issue to the court members. However, the opinion, while referring to the Ornelas case, stated, " ... we held that if there was a factual dispute concerning jurisdiction which would have an effect on the ultimate guilt or innocence of the accused, it should be presented to the court-martial for determination." (underscoring supplied)

There followed the case of United States v. Johnson,[91] the opinion for which was written by the late Judge Brosman. The court finally concluded that the accused was a member of the service as a matter of law. Of more particular interest is the language, " ... despite a defense request, no instruction was supplied the members of the court advising them that they must first find that the accused had been a member of that Armed Service before they might lawfully find him guilty

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90 2 USCMA 383, 9 CMR 13 (1953)
91 6 USCMA 320, 20 CMR 36 (1955)

of having deserted it." It is believed that this statement leans toward the guilt or innocence concept.

Finally, in United States v. Berry,[92] again written by Chief Judge Quinn, it was stated, while again referring to the Ornelas case,

> " ... we were concerned with disputed questions of fact regarding a matter which would bar or be a complete defense to the prosecution. A matter of that kind should 'properly be considered by the court in connection with its determination of the accused's guilt or innocence.' Manual for Courts-Martial, United States, 1951, paragraph 67e."

The language in the Berry opinion of course reverts to the defenses or objections concept as to when the court members decide issues of fact, as compared with the theory that factual issues regarding a motion are only referred to the court when the facts relate to guilt or innocence.

From the foregoing cases, it appears that the Ornelas and Berry opinions[93] support the theory that any factual issue raised by a motion to dismiss relates to a defense or objection in bar of trial and therefore should be submitted to the court members for determination. But the language in the McNeill and Johnson cases[94] appears to limit such factual issues to those which only relate to the guilt or innocence of the accused. It is to be noted, however, that this rule of law as to factual issues connected with motions was established and affirmed in jurisdictional cases involving desertion. In other words, these cases concerned the accused being unable to desert the service

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92 6 USCMA 609, 20 CMR 325 (1956)
93 United States v. Ornelas, 2 USCMA 96, 6 CMR 96 (1952)
United States v. Berry, 6 USCMA 609, 20 CMR 325 (1956)
94 United States v. McNeill, 2 USCMA 383, 9 CMR 13 (1953)
United States v. Johnson, 6 USCMA 320, 20 CMR 36 (1955)

if he was not a member thereof. Consequently, a determination of the issue as to whether or not the accused was a member of the service had a direct bearing on whether or not he could be found guilty of deserting the said service. Thus, in result, there is no conflict among these cases between the guilt or innocence concept and the defense or objection concept when determining whether or not a factual issue should be submitted to the court members.

Digressing slightly from the foregoing cases, had the jurisdictional factual issue been raised on a motion to dismiss in a robbery case or in the trial of a civilian overseas, may there be a different result. In a trial on a robbery charge, the accused might contend that he was not a member of the service. Although jurisdictional, this type of an offense is different from desertion, which is solely military in nature. It requires military membership before it may be committed. Similarly, a civilian accompanying the armed forces overseas may raise the question of jurisdiction when charged with a civilian criminal offense as distinguished from one which is strictly military. The question, of course, is whether or not a contested factual issue in these instances should be referred to the court members when considering a motion to dismiss based upon lack of jurisdiction.

Digressing further, suppose the motion to dismiss is based upon the statute of limitations or double jeopardy; then would it be necessary to submit a contested issue of fact to the court for its determination. Both of these operate strictly as a bar to trial rather than having any bearing on guilt or innocence.

As stated in the Ornelas case,[95] paragraph 67, MCM, 1951, dealing with motions was patterned after Rule 12(b), Federal Rules of Criminal Procedure.[96] Subparagraph 4 of the latter, previously quoted in part, states that issues of fact when considering defenses and objections shall be referred to a jury if a jury trial is required under the Constitution or an Act of Congress. Paragraph 67e., MCM, 1951, follows Rule 12(b), Federal Rules of Criminal Procedure in its language. The Manual cites an example where it would be appropriate for the law officer to defer his ruling on a motion involving the statute of limitations; it involves a defense contention that the offense was committed earlier than alleged so as to be barred. This example is one situation which is rather obvious, but it does demonstrate that passing to the court members certain issues of fact in connection with motions was contemplated by the framers of the Manual. The extent to which they intended to submit issues of fact remains in doubt; it can only be interpreted from its language and the Federal Rules of Criminal Procedure.

To give credence only to the guilt or innocence concept, i.e. the factual issue must relate to the guilt or innocence of the accused before it is submitted to the court members for consideration, would in effect reject the statement contained on page 82 in the Legal and Legislative Basis, MCM, 1951, to the effect that paragraph 67, MCM, 1951, was patterned after Rule 12 (b), Federal Rules of Criminal Procedure. In order to follow the Code's provision for making military

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[95] United States v. Ornelas, 2 USCMA 96, 6 CMR 96 (1952)
[96] Legal and Legislative Basis, MCM, 1951, p. 82

court rules similar where possible to those in the federal district courts,[97] to be consistent with the passage in the Legal and Legislative Basis, MCM, 1951, and to adhere to Rule 12(b), Federal Rules of Criminal Procedure, it is believed that the language of Judge Quinn in the Berry case[98] aptly announces the proper rule so as to reconcile the above provisions. To repeat, he stated while discussing the Ornelas case,[99]

> " ... we were concerned with disputed questions of fact regarding a matter which would bar or be a complete defense to the prosecution. A matter of that kind should 'properly be considered by the court in connection with its determination of the accused's guilt or innocence.' ..."

It is believed that making any other determination in this field would be tantamount to giving a law officer greater power in deciding a factual issue on a motion than that apparently possessed by a federal judge; it is doubtful that anyone would contend that Congress or the framers of the Manual so intended.

There does, however, remain another question to be decided. It results from the statement of Chief Judge Quinn in the Ornelas case[100] when he stated, " ... we should add that it matters not, in our opinion, whether the issue is submitted (to the court members) at the time the motion is made or at the conclusion of the case when the court is required to deliberate on the evidence." On deciding a motion, the Manual provides that the accused has the burden of

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97 Art. 36, UCMJ
98 6 USCMA 609, 20 CMR 325 (1956)
99 United States v. Ornelas, 2 USCMA 96, 6 CMR 96 (1952)
100 Ibid.

supporting it by a preponderance of evidence.[101] But where the statute of limitations is involved there is an exception; it occurs where the prosecution wishes to show the absence of the accused from the territory or some other impediment stopped the running of the statute.[102] In such an event, the prosecution has the burden of showing by a preponderance of evidence that the statute was tolled during a portion of the period. Further, the Code provides that questions of this type are decided by a majority vote, a tie vote being determined in favor of the accused.[103] Therefore, assuming that the court members were to vote on an issue of fact at the time a motion is made, the accused would have the burden of supporting his motion by a preponderance of evidence and must secure at least a tie vote. Turning to the situation where the court members would decide the factual issue while deliberating on the evidence, it might be possible to divorce the factual issue from the guilt or innocence so as to use the Manual provisions regarding the burden of proof and the number of votes required. It would seem more logical, however, to have those issues determined under the same rules as those applicable to guilt or innocence, namely, proof beyond a reasonable doubt by the prosecution and at least a two-thirds majority vote against the accused. Therefore, there exists a clear difference as to when the issue is submitted to the court members, and the question has not been as yet answered.

In view of the very unsettled law in this area, some conclusions are here drawn for guidance until future decisions clarify the status of factual issues on motions. Initially, the law officer must

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101 par. 67e., MCM, 1951
102 par. 68c., MCM, 1951
103 Art. 52(c), UCMJ

determine if there are any contested issues of fact; if not, the law officer may rule finally on the motion, either at the time it is made or later in the trial if he desires to defer his ruling. Where there is a contested issue of fact concerning any motion which would operate as a bar to trial, such issue must be referred to the court members for determination. As to when the issue should be submitted to the court, it would appear safer, from the viewpoint of preventing the law officer being overruled upon review, for him to do so under appropriate instructions when the court deliberates upon the guilt or innocence of the accused. Future decisions may eventually clarify this latter point as to when in relation to the trial the court should resolve the factual issue. Infrequency of its occurrence can result in there not being a complete answer for quite some time. In any event, it is believed that the law officer's power in this field will ultimately be considered equivalent to that of a federal judge.

DISCOVERY AND INSPECTION The judge may order the district attorney, if he grants the motion, to show tangible objects to the defendant's counsel so that photographs or copies may be made.[104] This rule does not have a military counterpart nor its use employed, since the government prior to trial is required to make available the names of witnesses and to provide the accused with a copy of the statements obtained by the investigating officer.[105] There has not been any determination by the U. S. Court of Military Appeals whether or not

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104 Federal Rules of Criminal Procedure, Rule 16
105 par. 33i (2), MCM, 1951

this rule is applicable in a court-martial. An Army Board of Review discussed it while reviewing the Batchelor case.[106] It decided that the rule was not there applicable because of the failure to meet the rule's requirements, viz, (1) tangible objects, (2) which belonged to the accused or were obtained from him or from others by seizure or process, (3) material to the preparation of the defense, and (4) that the request was reasonable.[107] The Board's opinion left the impression, however, that such a motion was proper before a military court when the defense wishes to see additional material in the possession of trial counsel, provided the proper foundation is laid. Although discovery and inspection may be in the nature of a motion for appropriate relief, it is believed to be somewhat different and within the power of the law officer to grant.

SEVERANCE OF DEFENDANTS In a federal court a defendant may request a severance of his case from that of his co-defendants,[108] and the decision rests in the sound discretion of the trial judge.[109] In the absence of any conflict of interest among the defendants, it is sufficient if they are represented by as many attorneys as there are defendants.[110] The power of the law officer in granting a severance of accused in a general court-martial is the same.[111] The party making the motion must show good cause, and, if not granted, has the burden of showing on review that there was a clear abuse of

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106 CM 377832, Batchelor, 19 CMR 452, affirmed but not discussed, United States v. Batchelor, 7 USCMA 354, 22 CMR 144 (1956)
107 Federal Rules of Criminal Procedure, Rule 16
108 Federal Rules of Criminal Procedure, Rule 14
109 Opper v. United States, 348 U. S. 84 (1954)
110 Lebron v. United States, 229 F.2d 16 (D.C. Cir., 1955) cert. den., 351 U. S. 974
111 par. 69d., MCM, 1951

discretion by the law officer.[112] The mere fact that a pre-trial statement of one co-accused implicates another does not require severance since proper instructions by the law officer provide adequate safeguards against prejudice to the co-accused.[113] Failure of the accused to request a severance in an improper joinder constitutes a waiver in the absence of a showing on review that there was a manifest miscarriage of justice.[114] Thus, the federal court and the military court are closely aligned on this subject.

DEPOSITIONS. In a federal criminal proceeding depositions may only be ordered taken and used upon the defendant's motion,[115] whereas in the military they may also be used by the prosecution.[116] The motion in a federal court may be made any time after the filing of an indictment or information, and its being granted is discretionary with the trial judge.[117] In the military, depositions may be taken after charges have been preferred but before court proceedings commence; they may also be taken while the trial is in progress.[118] The Manual provides for the law officer, after trial begins, approving the taking of a deposition but requires his referring the matter to the convening authority if he deems the deposition should be forbidden for good cause.[119] Although there are a paucity of decisions pertaining to the law officer's ruling on the taking of depositions, it

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112 United States v. Evans, 1 USCMA 541, 4 CMR 133 (1952)
113 United States v. Forner, 3 USCMA 306, 12 CMR 62 (1953)
114 United States v. Rodenheiser, 2 USCMA 130, 7 CMR 6 (1953)
115 Federal Rules of Criminal Procedure, Rule 15
116 Art. 49, UCMJ
117 Heflin v. United States, 223 F.2d 371 (5th Cir., 1955)
118 Art. 49, UCMJ
119 par. 117b., MCM, 1951

probably is due to their being invariably taken before the commencement of court-martial proceedings. An Air Force Board of Review has held it to be prejudicial error for the law officer to refuse a continuance to take depositions, since the accused had shown good cause.[120] But the U. S. Court of Military Appeals has held that the law officer did not abuse his discretion by refusing to allow the taking of further depositions from a witness who had already deposed where further depositions would only endeavor to have the deponent change his answers.[121] Neither case discussed the law officer's failure to refer his denial to the convening authority in accordance with the Manual.[122] This would lead to the conclusion that the law officer's ruling on the matter may be final regardless of the Manual provision. Certainly it would be in consonance with the U. S. Court of Military Appeals' expression of the law officer's independence as set forth in the Knudson case.[123] If so, the law officer's power, after the trial commences, would be the same as that of the federal judge.

SEARCH AND SEIZURE. Personal property, stolen or embezzled in violation of U. S. law, or designed and intended for use or has been used as a means for committing a criminal act, may be seized by order of the judge of a federal court.[124] It is his duty to issue the warrant if he is satisfied that grounds for the application exist or

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120 ACM 6169, Lineberry, 8 CMR 767
121 United States v. Parrish, 7 USCMA 337, 22 CMR 127 (1956)
122 par. 117b., MCM, 1951
123 United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954)
124 Federal Rules of Criminal Procedure, Rule 41(b)

there is probable cause to believe that they exist.[125] His determination to issue the warrant is conclusive unless there is a showing that he acted arbitrarily or erroneously exercised his power.[126]

In the civilian community search warrants are used to seize unlawfully possessed property which seizure would itself be unlawful because of Constitutional protection against unreasonable seizures,[127] whereas searches in the military may be ordered by the commanding officer, a power deemed inherent in his authority to command.[128] In the military there is no reference either in the Code or the Manual regarding the law officer having any power whatsoever similar to search and seizure under Rule 41(b).[129] Such authority may be delegated to others within his command.[130] But the power to order a search extends only to military areas; a search warrant is necessary off the post or station even though government property is being sought.

There is no decision regarding a law officer ordering a search as a federal judge may. Possibly, a law officer may receive by motion during trial a request for a search and order it be made under Rule 41(b) Such order could be construed as lawful based upon the Congressional intent to equate the law officer to a federal judge wherever possible.[131] However, military command problems may result when the person conducting the search ordered by a law officer passes from the area of one senior

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125 United States v. Stewart, 79 F. Supp. 313 (E.D. Pa., 1948)
126 Dixon v. United States, 211 F.2d 547 (5th Cir., 1954)
127 U. S. Const., Amend.IV
128 par. 152, MCM, 1951
129 Federal Rules of Criminal Procedure, Rule 41(b)
130 Ibid.
131 Federal Rules of Criminal Procedure, Rule 41(b)
132 Hearings before a Subcommittee of the Committee on Armed Forces, House of Representatives on H.R. 2498, 81st Cong., 1st Sess.,p.1153 (194

officer in command to search an area under the control of another senior officer. There also would be the question of the legality of a search ordered by a law officer in a command other than that of the convening authority. This may sound unusual, but command authority and general court-martial authority are not necessarily parallel. Expressed otherwise, a command having general court-martial jurisdiction over a subordinate installation does not necessarily exercise command control over that installation. Thus, it is concluded, from a practical viewpoint, a law officer, faced with a request for a search, particularly outside the convening authority's command, would be more astute in directing that the trial counsel contact the convening authority to arrange at command level for the search. This conclusion is reached notwithstanding the possibility that the law officer could administratively be authorized[133] by the convening authority to order searches in accordance with Rule 41(b),[134] and that the law officer may, and probably does, have an inherent power of his own to order a search within at least the command of the convening authority.

SUBPOENAS A subpoena may be issued by a federal court compelling the attendance of a witness.[135] However, defense witnesses will only be subpoenaed after the filing of an affidavit showing that the testimony will be material, that the defendant cannot go safely to trial without the witnesses' testimony and that the defendant is unable to pay the witnesses' expenses.[136]

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133 par. 152, MCM, 1951
134 Federal Rules of Criminal Procedure, Rule 41(b)
135 Federal Rules of Criminal Procedure, Rule 17
136 Ibid.

But in the military, defense counsel has an equal opportunity to have a witness subpoenaed with that of the prosecution.[137] The trial counsel subpoenas witnesses.[138] Defense counsel, where there is disagreement with the trial counsel concerning the need for a witness, must submit in writing a synopsis of the testimony expected from the witness, full reasons which necessitate personal appearance, and any other matter showing the expected testimony is necessary to the ends of justice.[139] The matter is referred before trial to the convening authority, but if the controversy arises after the court convenes, the decision is made by the law officer.[140] This procedure in the Manual lends support to the concept that the law officer's power does not begin until the court meets; and after it does meet, his ruling is final.[141]

VENUE; The location of a federal criminal trial is normally the district or division where the offense occurred.[142] The defendant is entitled to his trial taking place where the offense was commited as a matter of right under the U. S. Constitution[143] and the Federal Rules of Criminal Procedure;[144] but if the court, upon the defendant's motion, is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the judge

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137 Art. 46, UCMJ
138 par. 115d., MCM, 1951
139 par. 115a., MCM, 1951
140 Ibid.
141 United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954)
142 Federal Rules of Criminal Procedure, Rule 18
143 U. S. Const., Amend. VI
144 Federal Rules of Criminal Procedure, Rule 18

may grant a motion for appropriate relief to change the place of trial to another district or division.[145] The trial court, in deciding the motion, is vested with considerable discretion.[146] For instance, the motion should be granted where publicity is intense at the time the jury is to be impaneled so as to create a hostile climate, resulting in the assumption that the defendant would not receive a fair and impartial trial.[147]

In the military, neither the Code nor the Manual refer to changing the place of trial because of prejudice. However, in United States v. Gravitt,[148] the U. S. Court of Military Appeals recognized a motion for appropriate relief would be proper to change the place of trial if the accused could demonstrate that he would be adversely influenced by a general atmosphere of hostility or partiality against him. Military cases do not specifically discuss the discretionary feature; by implication it would appear that the federal rule would be followed, viz., subject to reversal only where the discretion is abused.[149]

Also undecided is the finality of the law officer's ruling if he were to grant the motion. According to the Manual, the convening authority, if he disagrees with a ruling by the court, may return the case to the court with an explanation of his reason for disagreement and direct a reconsideration of the ruling. It further states that the court may exercise its own discretion in reconsidering when the

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145 Federal Rules of Criminal Procedure, Rule 21

146 Bianchi v. United States, 219 F.2d 182 (8th Cir., 1955) cert. den., 349 U.S. 915

147 United States v. Florio, 13 F.R.D. 296 (S.D. N.Y., 1952)

148 5 USCMA 249, 17 CMR 249 (1954)

149 ACM 8609, Brossman, 16 CMR 721, pet. rev. den., 16 CMR 292

disagreement only involves issues of fact,[150] which is the case when change of venue is concerned. It is therefore concluded that the law officer's ruling should be final, subject only to his reconsideration. In this respect his ruling should be similar to the finality of his ruling on continuances.[151]

BILL OF PARTICULARS. Such a bill may be requested for cause in a federal court.[152] It cannot be used to disclose in detail the prosecution's evidence but is employed to define more specifically the of - fense charged.[153] Whether or not it will be allowed rests in the sound discretion of the trial judge.[154] If the indictment is definite enough to prevent double jeopardy and allow the defendant to prepare his case, it is considered sufficient and the request will not be granted.[155] In the military, the Code is silent, but the Manual provides for motions to grant appropriate relief,[156] which, under proper circumstances, may be equated to a request for a bill of particulars. The Manual provides that the court should proceed if the accused is not in fact misled.[157] It further provides that the court, in other words the law officer, may direct the specification be stricken and disregarded, grant a continuance pending application to the convening authority for directions, or permit the specification to be amended so as to cure the defect.[158]

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150 par. 67f., MCM, 1951
151 United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954)
152 Federal Rules of Criminal Procedure, Rule 7
153 Cefalu v. United States, 234 F.2d 522 (10th Cir., 1956) 350 U.S.
154 Reynolds v. United States, 225 F.2d 123 (5th Cir., 1955)cert. den.
155 Sawyer v. United States, 89 F.2d 139 (8th Cir., 1937)
156 par. 69, MCM, 1951
157 par. 69b (2), MCM 1951
158 par. 69b (3), MCM, 1951

Although a bill of particulars is not specifically recognized in a military court, the same result is reached through a motion for appropriate relief. And a motion to make a specification more definite rests in the discretion of the law officer whose determination will not be disturbed unless there is a showing of an abuse of discretion.[159] Thus, the net result of the power exercised by the trial judge and the law officer in this field is the same.

SUPPRESSION AND RETURN OF EVIDENCE. Illegally obtained evidence may be suppressed by motion in a federal court.[160] The motion may be made in the district where seized or in the district where the trial is to be held.[161] The burden is on the defendant to sustain the motion by showing that the seizure was unconstitutional.[162] If proper, the trial judge will grant the motion after a hearing, or he may postpone his decision until the trial.[163] The purpose of the Rule is to prevent the delay of the trial for the determination of a collateral issue.[164]

In the military, such a motion would run squarely into the provision of the Manual which states that, "Military courts have no authority to order a return to the accused of illegally seized property, or to impound such property for the purpose of suppressing its possible use as evidence ... ",[165] the theory being that there is ample opportunity

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159 ACM 8609, Brossman, 16 CMR 721, pet. rev. den., 16 CMR 292
160 Federal Rules of Criminal Procedure, Rule 41
161 Ibid.
162 On Lee v. United States, 343 U. S. 747 (1952)
163 United States v. Leiser, 16 F.R.D. 199 (D.C. Mass., 1954)
164 United States v. Gatewood, 109 Fed. Supp. 440 (D. C. 1953), reversed other grounds, 209 F.2d 789
165 par. 152, MCM, 1951

to object to the evidence when it is offered. Notwithstanding, there would seem to be a place for the Rule[166] in the military in order to divorce and decide a collateral matter before trial of the issues, thereby simplifying the procedure of the trial itself. This would be particularly true if the military were to adopt the federal pre-trial concept of disposing of collateral matters before the jury is impanelled. In addition to the above announced reason for the Rule, the defense may wish to use the tactic of removing from any consideration during the trial certain material that has been illegally seized. There are no military precedents among reported cases, probably because of the Manual provision. Any future military case in which the motion for suppression is granted will not offer an opportunity for a final decision on review; and it may require a particular case where there is such gross prejudice by not granting a motion to suppress that a review will be allowed. Except for the Manual provision, there would appear to be no reason why such a motion could not be permitted and thereby align the law officer's power in this field with that of the federal judge insofar as suppression is concerned; it should not, however, extend to returning the property to the accused because it is believed the law officer lacks authority to decide property rights.

This concludes a comparison of the law officer's powers with those exercised by a federal judge before trial. Next will be considered and compared those powers the judge exercises during trial.

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166 Federal Rules of Criminal Procedure, Rule 41

CHAPTER IV

COMPARISON OF TRIAL POWERS

Powers considered in this chapter usually occur during the federal procedure concept of a trial. In a general court-martial they may occur during the trial of the issues or before.

FAIR TRIAL. Both the judge and the law officer are required to see that a person has a fair trial. In a federal court the judge has the power and the duty to control and direct the trial;[167] he must safeguard the rights of all the parties before it;[168] he must be impartial both toward the defendant and the government;[169] and he is to give the defendant a fair trial regardless of any faults of those representing him.[170] In comparison, the law officer, according to the Manual, is responsible for the fair and orderly conduct of the proceedings.[171] In commenting on evidence, his remarks should not extend beyond an accurate, fair, and dispassionate statement of what the evidence shows. He should not depart from the role of an impartial judge.[172] He must direct the trial in accordance with recognized procedure and in a manner so as to bring an end to the hearing without prejudice to either party. He may avoid cluttering up the proceedings with unnecessary, immaterial, or repetitious questions or issues. He must be careful to remain impartial and scrupulously fair throughout the trial.[173]

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167 United States v. Green, 176 F.2d 169 (2d Cir., 1949)
168 Hallinan v. United States, 182 F.2d 880 (9th Cir., 1950) cert. den., 341 U. S. 952
169 United States v. Wheeler, 219 F.2d 773 (7th Cir., 1955)
170 United States v. Dennis, 183 F.2d 201 (2d Cir., 1950) aff'd 341 U.S.494
171 par. 39a., MCM, 1951
172 par. 73c., MCM, 1951
173 United States v. Jackson, 3 USCMA 646, 14 CMR 64 (1954)

PRESIDENT OF A GENERAL COURT-MARTIAL. In a general court-martial the president has certain duties which are normally exercised by the judge of a federal court.[174] The president sets the time and place of trial and prescribes the uniform to be worn; and he may consult with the law officer as to the time the trial commences.[175] The law officer may also be consulted by counsel as to the time of assembly[176] but apparently should not discuss a continuance with one counsel in the absence of the other.[177] The president, as presiding officer of the court, takes appropriate action to preserve order in the open sessions.[178] He shares this duty with the law officer, since the latter initiates contempt proceedings,[179] and is responsible for the orderly conduct of the trial.[180] The president may recess or adjourn the court, subject to the request of counsel that a certain portion of the trial be completed first, which ruling rests solely with the law officer as an interlocutory matter.[181] There is clearly a distinction between a recess or adjournment on the one hand and a continuance on the other, the ruling on the latter being entirely within the law officer's discretion.[182] Lastly, the president is the spokesman for the court and presides during closed sessions.[183] In many respects he is like a jury foreman.

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174 par. 40b., MCM, 1951
175 par. 58b., MCM, 1951
176 par. 39b., MCM, 1951
177 CM 391199, Brown, 16 October 1956
178 par. 40b(1)(b), MCM, 1951
179 par. 118b., MCM, 1951
180 par. 39b., MCM, 1951
181 par. 40b (1)(d), MCM, 1951
182 par. 58b., MCM, 1951
183 par. 40b (1)(e), MCM, 1951

It may be contended that the law officer should assume those duties of the president which are not connected with court deliberations. But since the president is usually the senior military officer in the courtroom, it would not be consistent with military precedents for him to be subordinate to the law officer in these administrative matters. If the military services as a policy were to utilize law officers senior to the president in rank, then the Manual should appropriately be changed in order to give full control of the trial to the law officer. However, under current practice, it is better for the law officer to retain only that power necessary to exercise control during the trial when these administrative matters become interlocutory in nature.

DISQUALIFICATION OF JUDGE OR LAW OFFICER. Knowledge of certain facts relating to the issues on the part of the federal judge before trial commencement is not prohibited. It, of course, cannot extend to bias or prejudice.[184] The military rule in this respect, although the Code and the Manual are silent, does not appear to be unduly restrictive. In a U. S. Air Force case, the law officer, who also was an assistant staff judge advocate, reviewed the pre-trial investigation for the purpose of familiarizing himself with legal issues that might develop during the trial. He denied that he reached any conclusion or had any personal interest in the outcome. The Board of Review was of the opinion that such prior knowledge by the law officer was insufficient to challenge the law officer for cause.[185] The U. S. Court

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184 C.J.S., Judges, Sec. 93
185 ACM 9429, Cavender, 17 CMR 938, pet. rev. den., 20 CMR 398

of Military Appeals has very recently considered the same factual situation in United States v. Fry.[186] The court expressed the opinion that the law officer's reviewing the pretrial investigation and summaries of expected testimony prior to trial was not good practice because it is too close to a violation of the spirit of the Code and the Manual to merit approval; but in this particular case the record did not show that the accused was harmed thereby. Consequently, it is believed that the law officer's conduct during a trial will be carefully scrutinized in the future when there is evidence that he has prior knowledge of the facts, but that, as in the federal courts, mere knowledge of certain facts before trial will not be of itself grounds for challenging him.

Personal disqualification by the trial judge in a criminal court is his duty on his own motion whenever he has an interest in or is biased regarding a particular case.[187] Hearing a closely related case or again presiding after a particular case has been remanded does not in and of itself disqualify him; there must be an actual showing of bias.

Personal disqualification of the law officer in the military is based on certain statutory reasons, such as being the accuser, a witness for the prosecution, investigating officer, or as counsel. The Manual goes further by stating as examples that participation in the trial of a closely related case, or upon a rehearing or a new trial, having first heard the case, are other circumstances constituting grounds for challenge.[189] And the law officer has a duty to disclose any

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186 7 USCMA 682, 23 CMR 146 (1957)
187 C. J. S., Judges, Sec. 93
188 30 Am. Jur., Judges, Sec. 32
189 par. 62f (13), MCM, 1951

possible grounds for challenge.[190]

The unqualified language of the Manual appears to be unduly restrictive for a law officer to be subject to challenge for cause in an allied case or in a rehearing, particularly in view of the Code's provision that courts-martial apply when practicable the principles of law recognized in the trial of criminal cases in the United States district courts.[191] Thus it would appear that a challenge of the law officer for cause based upon this Manual provision should be limited to the situation where there can be a showing of actual prejudice or bias on his part. Obviously the record would be subject to close scrutiny on review. Such a construction of the Manual would then make the law parallel the federal rule and would also be practical. In one Army case, a Board of Review held there to be error where the same law officer sat at a rehearing after stating on voir dire that he could impartially and faithfully perform his duties.[192] In following the Board of Review decision and the Manual, if a law officer were automatically disqualified by having served as such in an allied case, six accused tried separately would require six different law officers.

Although there is a duty on the part of the law officer to make known possible grounds upon which he may be subject to challenge,[193] what should he do when knowing that he is prejudiced? Divulging the factual reason to the court for its ruling on a challenge might be prejudicial.[194] As an example, consider a situation where the law

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190 United States v. Schuller, 5 USCMA 101, 17 CMR 101 (1954)
191 Art. 36, UCMJ
192 CM 375027, Grosel, 17 CMR 394
193 United States v. Schuller, 5 USCMA 101, 17 CMR 101 (1954)
194 United States v. Richard, 7 USCMA 46, 21 CMR 172 (1956)

officer has good reason to believe that the accused at some previous time had stolen property from him. Merely telling the court members that he is prejudiced against the accused may be insufficient for them to sustain a proper challenge. Easier and more properly he should disqualify himself forthwith in accordance with the civilian practice.[195]

PUBLIC TRIAL. A public trial is not extended in a federal court so as to allow the taking of photographs and the transmission of radio broadcasts. To prevent it Rule 55 of the Federal Rules of Criminal Procedure was purposely incorporated in view of the difficulties experienced in some state courts. A public trial is a right which is guaranteed to the defendant in a federal district court by the Constitution.[196] Any detraction from this right implies a prejudice which is practically impossible to prove by direct evidence.[197] But in the federal court, it is not necessary for the judge to admit spectators in such numbers so as to overcrowd the courtroom and take the space ordinarily occupied by court officers, jurors, witnesses, and relatives and friends of the defendant.[198] However, the judge may exclude youthful persons whose minds may be contaminated by the expected evidence in the trial of sex offenses.[199] It has been held to be prejudicial for him to exclude all persons except members of the bar, newsmen, and relatives of the defendant.[200] The U. S. Supreme Court has decided that at least counsel, friends, and relatives of the defendant should be permitted to attend the trial no matter with

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195 CM 390142, Torrente, 21 CMR 491.
196 U. S. Const., Amend. VI
197 United States v. Kobli, 172 F.2d 919 (3d Cir., 1949)
198 Ibid.
199 Ibid.
200 Tanksley v. United States, 145 F.2d 58 (9th Cir., 1944)

what the defendant may be charged.[201]

Admission of spectators in a court-martial does not extend to photographing in or broadcasting from a courtroom. The Manual goes one step further, however, than the Federal Rules of Criminal Procedure by also excluding television.[202] As for the exclusion of spectators in a court-martial, the law officer is governed by the Manual.[203] It states that as a general rule the public should be allowed to attend; but for security or other good reasons, it may be excluded by the convening authority. The mechanics for accomplishing this are not set forth. As a suggested method, the convening authority would notify the court when it meets. Since the convening authority with his assistants is in a better position to determine the need for security, his decision should unquestionably be respected. In the case of "other good reasons", the law officer may ultimately be the one to determine whether or not spectators should be excluded. This conclusion is based upon the decisions of the U. S. Court of Military Appeals regarding the interference by the convening authority with the law officer's performance of duty.[204] When the law officer is called upon to rule on the exclusion of spectators, he should exercise care to do so in his own right, irrespective of any convening authority directive, in order that the record will show that he acted free from and did not release his power to the convening authority; in all probability he will follow the latter's advice.

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201 Re Oliver, 333 U. S. 257 (1948)
202 par. 53e., MCM, 1951
203 Ibid.
204 United States v. Stringer, 5 USCMA 122, 17 CMR 122 (1954)
United States v. Allbee, 5 USCMA 448, 18 CMR 72 (1955)
United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954)

A recent case has been decided by the U. S. Court of Military Appeals settling several questions regarding public trials in the military.[205] It involved the offense of communicating obscene language over a telephone. The convening authority had directed that the public, except those whom the accused wished to nominate, be excluded from the trial; the accused objected and was overruled by the law officer. In the decision, the U. S. Court of Military Appeals reviewed the civilian rule on public trials, including those federal cases heretofore discussed. Also cited were two state court decisions, the first holding that it is permissible to temporarily exclude the public if a small child cannot testify before an audience,[206] and the second being the notorious Jelke case in which the press was improperly excluded in a vice trial.[207] The U. S. Court of Military Appeals stated that the Manual provision[208] must be construed within strict limits if it is to be upheld in the light of the same Court's previous ruling on military due process.[209] It concluded that there had been too great a restriction imposed by the convening authority and by the law officer and that the accused was entitled to have members of the press in attendance. As dictum, the opinion quoted Winthrop who had stated that, if the court determines, the proceedings shall not be reported other than officially and members of the press could be prohibited from taking notes;[210] the dictum went on to state that this rule could be

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205 United States v. Brown, 7 USCMA 251, 22 CMR 41 (1956)
206 Hogan v. State, 191 Ark. 437 (1935)
207 People v. Jelke, 308 N. Y. 56 (1954)
208 par. 53e., MCM, 1951
209 United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951)
210 Winthrop, Military Law and Precedents, 2d ed., 1920 Reprint, p.162

applied if matters of national security were involved. It is believed absurd to hold a trial with persons in attendance not properly cleared to handle security matters.

Although most newspapermen are loyal and would be willing to respect regulations concerning classified material, any particular one of them desiring to profit with a "sccop" could be tempted to divulge the information developed at the trial--and without the benefit of notes. Also there are undoubtedly correspondents whose political interests are contrary to those of the United States. Selection and admission of those who could be trusted, although possible at the supreme command level, would be almost impossible in the field where the court-martial would be sitting. In addition to the security question, which the court left undecided, there also was the problem of who, the convening authority or the law officer, makes the final determination. In the Brown case, there was no need to determine this issue. However, law officers are reminded to make their own independant ruling so as not to surrender power to the convening authority.

It would seem that the safest course for a law officer to follow at this time would be: (1) close the court upon motion in security cases, but only during such portions of the trial as necessary to receive the classified evidence, even though the accused objects; (2) close the court for any other reason while receiving evidence only upon the accused being given a specific opportunity to object; (3) remove youthful persons from the courtroom only while immoral testimony is being received; and (4) admit at least counsel, relatives, and friends of the accused in (2) and (3).

CHALLENGES. Prospective jurors may be challenged for cause by the parties to a criminal proceeding in the federal court system.[211] It is a serious duty of the court to determine the question of bias on the part of a juror; it has broad discretion in carrying out its duty.[212] This discretion extends to the questions asked of jurors; its decision will not be disturbed in the absence of a clear showing of abuse.[213] Under the Rules, the court may permit the defendant or his attorney and the attorney for the government to examine prospective jurors; or the court may examine the jurors itself.[214] If the court conducts the examination, it should permit the defendant and the government attorney to supplement the examination as the court deems proper. The court itself may excuse a juror for cause.[215] There is a provision for alternate jurors[216] to prevent mistrials due to the subsequent disqualification or inability of a juror to complete his duties.[217]

In the military certain reasons for challenge are automatically disqualifying.[218] There are also others which may be sufficient grounds for sustaining a challenge for cause.[219] For instance, the fact that a member of the court will be a witness for the prosecution is an example of the former, whereas the fact that the member participated in the trial of a closely related case is an example of

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211 Federal Rules of Criminal Procedure, Rule 24
212 Dennis v. United States, 339 U. S. 162 (1950)
213 Speak v. United States, 161 F.2d 562 (10th Cir., 1947)
214 Federal Rules of Criminal Procedure, Rule 42(a)
215 Yarborough v. United States, 230 F.2d 56 (4th Cir., 1956) cert. den., 351 U. S. 969
216 Federal Rules of Criminal Procedure, Rule 42(c)
217 Gillars v. United States, 182 F. 2d 962 (D.C. Cir., 1950)
218 Art. 25(d)(2), UCMJ
219 par. 62f., MCM, 1951

the latter. Contrary to the federal judge ruling upon the qualification of a prospective juror who has been challenged for cause, the court members in a court-martial vote upon whether or not a challenge for cause should be sustained.[220] This appears even to be true where it would be illegal under the Code for the member to serve on the court. The law provides for the ruling on challenges for cause being decided by the court members; there is no reference to the law officer having any power in the matter.

In a recent decision by the U. S. Court of Military Appeals it was held that the law officer himself could challenge a court member for cause.[221] In that case, after prosecution evidence had begun, a court member stated that he believed he had sat as a member on the trial of a closely related case. The law officer excused the court member subject to objection by any member of the court. No member of the court objected but the defense counsel took issue arguing that he would prefer the member sit on the court.

The opinion held that, since a member generally could be excused after arraignment only upon challenge for cause under the Code, it was apparent that the law officer excused the member on the basis of challenge, and that, although he ruled on the challenge subject to the objection of any member, it was error. It further stated that there was no claim and the court could discern no likelihood that the procedure improperly influenced the remaining members of the trial court or prejudiced the accused in any substantial right. A majority of the

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220 Art. 51, UCMJ

221 United States v. Jones, 7 USCMA 283, 22 CMR 73 (1956)

court were of the opinion, while discussing challenges, that a member could only be removed after a vote by the court in conformance with Articles 51(a) and 52 of the Code. Chief Judge Quinn, who wrote the opinion, was in the minority when he stated that it was an empty ritual for the court to take a formal vote when a member must be excused. However, the court concluded that the law officer had a right to challenge a court member for cause on his own motion, either during the regular challenging procedure or during the trial of the issues.

It is unfortunate that the other judges did not agree with Chief Justice Quinn in his empty ritual concept. If the law officer were allowed to rule on challenges, he would be able to prevent the court from making an erroneous decision, particularly in regard to the first eight reasons for challenge in the Manual.[222] These reasons are that the prospective member is: (1) not eligible to serve, (2) not appointed, (3) the accuser, (4) a prospective prosecution witness, (5) the investigating officer, (6) the person who acted as opposing counsel, (7) upon rehearing or new trial a member which first heard the case, and (8) an enlisted member of the same unit as the accused. At best the law officer could only recess and notify the convening authority if the court erred in deciding the challenge; otherwise his only solution would be to declare a mistrial. And these remedies might also be his only recourse if the court erroneously decided a challenge for cause based on a reason other than the first eight Manual grounds.

The decision by the U. S. Court of Military Appeals treated the field of challenges regardless of when made ; there is no indication

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222 par. 62f., MCM, 1951

as to whether it was done purposely or inadvertently. This too was unfortunate because the decision was in part based on Article 29(a), which states in effect that a member shall not be absent or excused after arraignment except for physical disability, or as a result of challenge, or by order of the convening authority for good cause. The Code is silent on the question of excusing members before arraignment.[223] The Manual states that a member of the court shall not be absent during the trial except for physical disability, as a result of challenge, or by order of the convening authority.[224] It is noted that this provision paraphrases the statute without defining what is meant by "trial". The Manual provision continues by stating that a member should notify the convoning authority if he believes there are reasons he should not sit on a particular case as enumerated in paragraph 62f (dealing with grounds for challenge).

As for the procedure to be followed for relieving court members between the time the court first meets and the arraignment, it has heretofore been considered that the challenge route is the only method. Such challenge would depend upon the voluntary disclosure of grounds for challenge by the court members, the law officer, or counsel, as well as other grounds developed on voir dire. But there may be a latent power residing with the law officer which is not readily apparent, based upon the following reasoning. The Manual provides that the law officer or a member who is subject to challenge because of one of the foregoing enumerated eight reasons as contained in par. 62f

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223 Art. 29(a), UCMJ
224 par. 41c., MCM, 1951

shall be excused forthwith.[225] The Manual is silent as to who will excuse him. Further, in United States v. Allen[226] the U. S. Court of Military Appeals, while discussing the power to excuse members from sitting on a case, said,

> " ... no doubt is entertained that a convening authority may validly delegate to his staff judge advocate, to the president of the court-martial, or to any other impartial official person, the power to excuse appointed court members for good cause. Under this grant of power, the approval of an excuse submitted by a member would import a genuine exercise of discretion as to the existence of other official duties, or similar circumstances, which serve to raise a conflict with prospective court service."

This quotation, particularly since it is found in a case involving the failure of all court members named in the appointing order to attend the commencement of the trial, would seem to be applicable to those situations arising before the court convenes. But need it be so limited? Merely by extending to the law officer the power to excuse members for good cause, there is nothing in the Code or the Manual which would preclude him from so acting prior to arraignment. To conform with the language in the Allen case,[227] the convening authority could delegate to the law officer in the appointing order power to excuse members for cause. For instance, assuming that a member of the court states that he has already formed an opinion in the case, the law officer could excuse the member for cause without there being a challenge. And if a party had challenged the member for cause, the law officer could still take the initiative, basing his action on his power to excuse rather than make a ruling on the challenge itself.

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225 par. 62(c), MCM, 1951
226 5 USCMA 626, 18 CMR 250 (1955)
227 Ibid.

Whether or not he would excuse the member then would be discretionary with him; if he failed to excuse the person, there would still exist the right to have the court members determine if the challenge should be sustained. Support for this position may be found in Judge Latimer's article in the Temple Law Quarterly in which he said, while discussing the apparent disqualification of a court member, " ... the law officer may excuse the member forthwith".[228] This procedure would be more in keeping with the Congressional and the U. S. Court of Military Appeals intent to have the law officer serve as nearly like a federal judge as possible, rather than narrow his powers as the Jones case seemed to do.[229]

CONTEMPTS. Both federal courts and courts-martial have the power to punish contempts, but the procedure is quite different. In the federal court a contempt may be punished summarily by the judge if he certifies that he saw or heard the conduct which is the basis for the contempt, and that it was committed in the presence of the court.[230] Other types of contempts may be punished but only after notice and, if Congress so provides, a jury trial.[231] If the contempt involves disrespect toward or criticism of the judge himself, he is disqualified from sitting.[232] This rule was derived from Cooke v. United States[233] which concluded that the judge should step down from the bench and arrange for another judge to preside over the contempt proceedings. But he should not allow himself to be driven from a case. Trial by

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228 A Comparative Analysis of Federal and Military Criminal Procedure 29 Temple L. Q. 1 (1955)
229 United States v. Jones, 7 USCMA 283, 22 CMR 73 (1956)
230 Federal Rules of Criminal Procedure, Rule 42(a)
231 Federal Rules of Criminal Procedure, Rule 42(b)
232 Ibid.
233 267 U. S. 517 (1924)

another judge prevents any "chance" of unfairness when misconduct of the judge has been alleged.[234] A judge, in his discretion, may postpone the summary proceedings until after the trial of the case in which the contempt occurred.[235]

A court-martial may punish any person for contempt who uses any menacing words, signs, or gestures in its presence or who disturbs its proceedings by any riot or disorder.[236] Other types of contempts such as the failure to obey a subpoena, are referred to a federal district court.[237]

For direct contempts, the type which a court-martial may punish for conduct in its presence, the drafters of the Manual considered the question to be interlocutory.[238] The Manual itself sets forth the method of proceeding whenever a contempt occurs.[239] It provides for the offender being given an opportunity to show cause why he should not be held in contempt. Then the law officer treats the matter in a preliminary question as to whether or not the person should be held in contempt, and, in doing so according to the Manual, disposes of it similarly as he would in the case of a motion for a finding of not guilty. Thus he makes his ruling subject to the objection of any member of the court.[240] If his ruling or the determination of the court is adverse to the party, the court then in closed session

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234 Schmidt v. United States, 115 F.2d 394, 398 (6th Cir., 1940)
235 Sacher v. United States, 343 U. S. 1 (1952)
236 Art. 48, UCMJ
237 Art. 47, UCMJ
238 Legal and Legislative Basis, MCM, 1951, p. 107
239 par. 118b., MCM, 1951
240 Art. 51, UCMJ

determines whether or not to convict, with the concurrence of two-thirds of the members being required.[241] The Code does not prescribe the procedure bywhich a person shall be held in contempt. Other than challenges, which are decided by the court, there are only two instances when, according to the Code, the ruling of the law officer is not final: in a motion for a finding of not guilty; and in a question regarding the insanity of the accused.[242] On all other interlocutory questions his ruling is final and binding on the court.

The drafters of the Manual thus adopted in contempt procedure a method of ruling which is not final by the law officer even though it is an interlocutory question. May not the Manual provision be considered contrary to the Code? Possibly so, in view of the permissive Code provision for the President of the United States making court-martial rules, so far as he deems practicable, which shall apply the principals of law recognized in the trial of criminal cases in United States district courts,[243] and in view of Rule 42(a),[244] which provides for summarily contempt punishment by the judge. The Manual, therefore, is the chief bar to the law officer acting in the same manner as a federal judge in a direct contempt. This may be a natural inheritance from previous armed forces court-martial procedures. Also the framers of the Manual could not have foreseen the law officer's rise in power as a result of the Court of Military Appeals' decisions so as to place him wherever possible on a level with the federal judge. They may

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241 par. 118b., MCM, 1951
242 Art. 51, UCMJ
243 Art. 36, UCMJ
244 Federal Rules of Criminal Procedure, Rule 42(a)

also have been bothered by the fact that the law officer does not have any sentencing powers, although, like the judge, he has fact finding powers regarding admissibility of evidence. This could have been possibly overcome by giving the law officer power to determine whether or not the offender is in contempt and giving the court members the power to sentence. And it may be difficult for a test case of the Manual procedure reaching the U. S. Court of Military Appeals due to the limited review prescribed for contempt proceedings (convening authority only).[245] The test may in the future arise where a law officer either purposely or inadvertently rules on a contempt question without referring it to the court. Then on appeal of the case in chief on its own merits, the high court may discuss this particular point. Case history in the military under the new Code on this point is nil.

Also in doubt in the military is the procedure which should be followed if the contempt involves a personal attack on either a member of the court, the entire court, or the law officer in the presence of the court. If the law officer were to make the final ruling in a contempt, the situation would be simplified; but under the present method of hearing a contempt,[246] it might be necessary, in conforming with the federal rule,[247] for the person or persons under attack to withdraw from the contempt hearing and allow the remainder to decide this interlocutory issue, with the appointment of additional temporary personal if required.

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245 par. 118b, MCM, 1951
246 par. 118, MCM, 1951
247 Federal Rules of Criminal Procedure, Rule 42

CONTINUANCES. A continuance may be granted by a federal judge, but the decision is within his discretion, and, in the absence of a showing of prejudice, it will not be disturbed on review.[248] It appears that the party requesting the continuance must have been diligent,[249] not responsible for the needed delay,[250] and that denial will probably effect the result of trial.[251] There must be a clear showing of abuse of discretion for there to be any relief on review.[252]

In the military, the Manual provides for a postponement, which, although similar to a continuance, occurs before trial as the result of an agreement between counsel and the president of the court, with the latter being able to consult with the law officer as to its necessity.[253] The inconvenience of meeting for a formal continuance is thus avoided. The Manual also provides for requesting before trial a continuance from the convening authority.[254] After commencement of the trial, the Manual provides, in conformance with the Code,[255] that a continuance may be granted by the court in its discretion upon the showing of reasonable cause.[256] This discretion is not reversible unless abused to the prejudice of the accused.[257] These Manual provisions follow the federal rule.

In United States v. Knudson,[258] the law officer granted a continuance pending the receipt of a reply from a communication sent by the

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248 Finnegan v. United States, 204 F.2d 105 (8th Cir., 1953)
249 Burton v. United States, 175 F.2d 960 (5th Cir., 1949)
250 Cyc. Fed. Proc., Sec. 45.01 et seq.
251 United States v. Bronson, 145 F.2d 939 (2d Cir., 1944)
252 United States v. Yager, 220 F.2d 795 (7th Cir., 1955)
253 par. 58b., MCM, 1951
254 par. 58e., MCM, 1951
255 Art. 40, UCMJ
256 par. 58, MCM, 1951
257 United States v. Parrish, 7 USCMA 337, 22 CMR 127 (1956)
258 United States v. Knudson, 4 USCMA 587, 16 CMR 161 (1954)

accused to the Secretary of the Navy requesting that he not be tried. The convening authority directed that the trial proceed and criticized the law officer for having exceeded his authority. The U. S. Court of Military Appeals stated that the convening authority's intervention was illegal and discredited the law officer in the eyes of the trial court. Although there is no quarrel with the decision in respect to the determination that the convening authority should not interfere with the law officer's ruling, it is unfortunate that the rule of law was based on this particular set of facts. It is believed that the ground for the continuance was not valid and Judge Latimer's dissent on this point is favored.

TREATMENT OF WITNESSES. In both types of courts this subject is important. Within the federal criminal system the judge has a duty to see that the case is properly presented in such a way that it is understood by the jury, and to do so, he may question witnesses in order to elicit further information or to clarify the facts.[259] He should confine testimony to relevant matters and question witnesses[260] so that all the truth is brought out in a nonprejudicial way to obtain justice. He has broad discretion in allowing the recall and cross-examination. He may thus control unnecessary humiliation of a witness.[261] He should not indicate any personal feeling in his examination of witnesses and should remain fair and impartial to both the government and the defendant.[262] The judge may call witnesses, but the practice is

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259 United States v. Rosenberg, 195 F.2d 583 (2d Cir., 1952) cert. den., 344 U.S.838

260 United States v. Stoehr, 100 Fed. Supp. 143 (M.D.Pa., 1951) aff'd., 196 F.2d 276, cert. den., 344 U. S. 826

261 Ibid.

262 Wilcoxon v. United States, 231 F.2d 384 (10th Cir., 1956) cert. den., 351 U. S. 943

considered undesirable.[263] In his discretion he may call a particular witness and allow both sides the opportunity to cross-examine him.[264]

Before a court-martial, the Manual permits the questioning of witnesses by the law officer and the court members.[265] The questions must remain within the bounds of cross-examination material, if the accused is questioned, but in the case of any other witness new matter may be brought up, subject, of course, to objection and further cross-examination.[266] Although the Manual allows a broad cross-examination of witnesses, the law officer may prevent repititious questioning of a discrediting type through inuendos and insinuations.[267] But he cannot limit the cross-examination of a witness merely because proof of prior misconduct is not in hand.[268] He may permit the cross-examination of the accused about his prior misconduct as a matter within his discretion.[269] Limiting the cross-examination of witnesses is within his discretion,[270] but it has been stated that he should allow a wide latitude.[271] The law officer may question a witness to develop facts as long as he does so in a fair and impartial way.[272] But it is error for him to cross-examine a witness like a prosecutor while trying to impeach a witness, introduce new material, and attempt to discredit the defense theory after there has been a thorough examina-

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263 Krogmann v. United States, 225 F.2d 220 (6th Cir., 1955)
264 United States v. Marzano, 149 F.2d 923 (2d Cir., 1945)
265 Steinberg v. United States, 162 F.2d 120 (5th Cir., 1947) cert. den., 332 U. S. 808
266 par. 149b (3), MCM, 1951
267 United States v. Long, 2 USCMA 60, 6 CMR 60 (1952)
268 United States v. Berthiaume, 5 USCMA 669, 18 CMR 293 (1955)
269 United States v. Hutchins, 6 USCMA 17, 19 CMR 143 (1955)
270 ACM 11127, Parrish, 21 CMR 639, reviewed but not discussed, United States v. Parrish, 7 USCMA 337, 22 CMR 127 (1956)
271 United States v. Hernandez, 4 USCMA 465, 16 CMR 39 (1954)
272 United States v. Berry, 6 USCMA 638, 20 CMR 354 (1956)

tion by the trial counsel.[273] The same rule also applies to questioning by court members, and the law officer has a duty to control the proceedings so as to prevent it.[274]

The Manual provides for the calling of witnesses by the court,[275] but does not state what is meant by the "court", ie. the law officer or the court members. The power of the latter in regard to calling witnesses has been considered by the U. S. Court of Military Appeals in the Parker case.[276] There, the court had closed for the consideration of the findings only to reopen and request additional evidence along certain lines. The defense claimed this action by the court was tantamount to a finding of not guilty and so moved. The motion was overruled, certain witnesses were recalled, and the accused subsequently found guilty. The U. S. Court of Military Appeals, mindful of the provision in the procedural guide of the Manual that whether or not a witness should be called is subject to the final determination of the law officer,[277] and the Code provision that the law officer's ruling is final on interlocutory questions,[278] concluded that, " ... a court-martial has the unrestricted right to call for further witnesses, subject only to the law officer's determination of admissibility." And it held this rule to exist even though the court members had retired to consider the findings. The opinion further stated that

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273 NCM 56 00575, Osborne, 21 CMR 556
274 United States v. Blankenship, 7 USCMA 328, 22CMR 118 (1956)
275 pars. 54b. and 149a., MCM, 1951
276 United States v. Parker, 7 USCMA 182, 21 CMR 308 (1956)
277 app. 8a., MCM, 1951, p. 517
278 Art. 51(b), UCMJ

the court must not desert its role as triers of fact to join the ranks of partisan advocates, citing the Smith case.[279]

In the United States v. Salley,[280] the court indicated a desire to see certain medical records concerning the accused. The law officer stated that the records probably would be inadmissible, but that any person who physically examined the accused could be called as a witness. After further discussion, the court withdrew its request. On appeal, it was contended that the law officer insufficiently advised the court of its right to examine records and call witnesses in connection with the physical and mental condition of the accused. The U. S. Court of Military Appeals held that the law officer did no more than indicate how he might rule concerning the admissibility of the medical records and pointed out a more advantageous method of obtaining the desired information. Further, the court reiterated that a court-martial has an unrestricted right to call for further witnesses, subject only to the law officer's determination of admissibility.

On its face the above discussed opinions would appear to detract rather than add to the power of the law officer because of the "unrestricted right" language contained therein. But being able to "call" for a witness is one thing; allowing the witness to testify is another. And the qualification that such testimony is subject to the law officer's ruling on admissibility weakens the power of the court members even more. For instance, if a court member asks for a certain witness to

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279 United States v. Smith, 6 USCMA 521, 20 CMR 237 (1955)
280 7 USCMA 603, 23 CMR 67 (1957)

be called to give particular testimony, the law officer might be able to determine immediately that such evidence would be irrelevant, and so rule, thereby obviating the necessity of even having the witness appear in court. It certainly should not be required that the witness take the stand and then have all his testimony ruled inadmissible because of irrelevance. Such procedure would merely be an empty ritual. But the law officer must proceed warily in this area. So in conclusion, these decisions probably do not actually detract from the law officer's power at all, but only stand for the rule that a court member may have an unrestricted right to have a witness called or recalled; and this to be true even though the court has closed to vote on the findings. Since the Manual does not specify that the law officer may also call witnesses, these decisions may also stand for the position that he has the same power, because it would be difficult to rationalize that the court members possess it but the law officer does not. However, he should proceed most carefully so as not to depart from his impartial position and become a partisan advocate. The powers of the judge and the law officer in their treatment of witnesses appears, therefore, to be about the same.

MISTRIAL. A motion for mistrial is recognized in the federal courts as appropriate, although there is no mention made of it in the Federal Rules of Criminal Procedure. It is used to discharge a jury to prevent the defeat of the ends of justice.[281] If a juror is withdrawn, the use of alternate jurors prevents the need of declaring a mistrial.[282] The military may accomplish the same result by having

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281 Scott v. United States, 202 F2d 354 (D.C. Cir., 1952) cert. den., 344 U. S. 879

282 Federal Rules of Criminal Procedure, Rule 24(c)

more than the minimum number of five members hear the particular case. In federal trials, but not so much so in the military, newspaper articles reaching and influencing the jurors have presented a problem.[283] Whenever the judge becomes aware of information which may be the basis for a mistrial, it is his duty to ascertain if the jury or the member has been influenced thereby.[284]

Another basis for a mistrial is improper remarks or conduct by counsel.[285] Comment by the prosecutor on the presentation of the defense to the effect that an alibi is "lousy" has been held insufficient to show an abuse of discretion when the judge refuses to order a mistrial.[286] Improper examination or cross-examination of a witness may be grounds for a mistrial if it is prejudicial.[287] Where there are improper questions asked of the defendant, there is no ground for a mistrial where an objection to the questioning is sustained.[288] Granting a motion for a mistrial rests within the discretion of the judge.[289]

Until recently the military had believed only the convening authority had the power to declare a mistrial.[290] Before the Code, the term mistrial existed in certain military law text books, but its use was in connection with discussions of former jeopardy, [291] and not as

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283 Briggs v. United States, 221 F.2d 636 (6th Cir., 1955)
284 Marson v. United States, 203 F.2d 904 (6th Cir., 1953)
285 Gerard v. United States, 61 F.2d 872 (7th Cir., 1932)
286 Sharp v. United States, 195 F.2d 997 (6th Cir., 1952)
287 Cyc. Fed. Proc., Sec. 48.148
288 United States v. Ginsburg, 96 F.2d 882 (7th Cor., 1938) cert. den., 305 U. S. 620
289 Wiltsey v. United States, 222 F.2d 600 (4th Cir., 1955)
290 NCM 228, Conway, 11 CMR 625
291 Winthrop, Military Law and Precedents (2d Ed., 1920 reprint) p.263
Winthrop, Abridgement Military Law, (1887) p. 104
Tillotson, Articles of War Annotated, p. 84

to whether the court itself could declare a mistrial. The aspect of the law officer having such power was first raised before the U. S. Court of Military Appeals in United States v. Stringer.[292] In that case, the president of the court made improper remarks due to the fact that the prosecution's case was badly prepared. The convening authority subsequently withdrew the case from the court and referred it to another. The Court of Military Appeals thoroughly explored the conduct of the court, the law officer, and the convening authority. It leaned heavily on the federal practice in its decision that the law officer has the power to declare a mistrial. But whether or not he shares this power with the convening authority is still in doubt. This conclusion is reached because the late Judge Brosman, who wrote the court opinion, believed that the primary power rested with the convening authority and reluctantly agreed with the other two members of the court that the law officer also could declare a mistrial. Chief Judge Quinn was of the opinion that the law officer was the only one with the power. Judge Latimer believed that both could exercise it. In United States v. Richard,[293] the same court composed of Chief Judge Quinn and Judge Latimer, stated that a mistrial was the proper method of disposing of a situation where one member of the court makes certain prejudicial disclosures to the other court members when stating the grounds upon which he himself is subject to challenge. Since Judge Ferguson, who was appointed to the vacancy left by the late Judge Brosman, did not participate in the decision, there is at present still doubt as to whether the power is exclusive or shared by the law

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292 5 USCMA 122, 17 CMR 122 (1954)
293 7 USCMA 46, 21 CMR 172 (1956)

officer with the convening authority.

Another point of interest is raised by a statement by Chief Judge Quinn in the Stringer case[294] in which he said, " ... if the law officer improperly grants a mistrial, his ruling may then be subject to review by the convening authority under the provisions of paragraph 67f of the Manual ..." The cited Manual paragraph states that a convening authority may return a record of trial to the court, if he disagrees with the action of the law officer, with the direction that the court reconvene and reconsider its ruling. It further states that if the difference of opinion relates to a matter of law, the court will accede to the views of the convening authority; but if the disagreement extends to issues of fact, the court will use its sound discretion upon reconsideration. Whether or not a mistrial should be declared is believed to fall in the factual category so that the convening authority may not overrule the law officer and direct that he proceed with the trial.

As has been stated above,[295] and recognized by the U. S. Court of Military Appeals,[296] the granting of a motion for a mistrial rests within the discretion of the trial judge; it is subject to review only when the discretion has been abused. In United States v. Knudson,[297] where the convening authority addressed a letter to the law officer stating that he had abused his authority in granting a continuance, the U. S. Court of Military Appeals held that the convening authority illegally interfered with the law officer's decision. Similarly,

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294 United States v. Stringer, 5 USCMA 122, 17 CMR 122 (1954)
295 Wiltsey v. United States, 222 F. 2d 600 (4th Cir., 1955)
296 United States v. Richard, 7 USCMA 46, 21 CMR 172 (1956)
297 4 USCMA 587, 16 CMR 161 (1954)

returning a record of trial to a court, the convening authority, when directing reconsideration of the ruling on a mistrial, may, in effect, be stating that the law officer abused his discretion. Consequently, although it seems settled that the law officer has the power to grant a mistrial, the question of its finality and exclusiveness is still in doubt.

INSTRUCTIONS. Prior to deliberating, instructions must be given to the jury by the federal judge[298] and to the court members by the law officer.[299] The requirements differ somewhat. The federal judge should be furnished desired instructions in writing at the close of the evidence, and he informs the parties prior to argument of instructions he will give. Error cannot be assigned unless objection is made to the particular instruction, stating clearly the grounds therefor.[300] Failure to submit requests timely for instructions is ground for not considering them.[301] But it is error not to rule on each instruction requested.[302] The reason for the objection is to inform the court of error or omission so that it may be corrected.[303] Rarely will a trial court's judgment be reversed for failing to give instructions in the absence of a seasonable request or exception, and then only if it constitutes a basic and highly prejudicial error.[304]

In the military, the Code in general provides for the law officer giving instructions on the elements of the offense charged, burden of

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298 Federal Rules of Criminal Procedure, Rule 30
299 Art. 51(c), UCMJ
300 Federal Rules of Criminal Procedure, Rule 30
301 Putman v. United States, 162 F.2d 903 (5th Cir., 1947)
302 Ross v. United States, 180 F.2d 160 (6th Cir., 1950)
303 United States v. Wilson, 154 F.2d 802 (2d Cir., 1946)
304 Cave v. United States, 159 F.2d 464 (8th Cir., 1947)

proof, presumption of innocence, and reasonable doubt. According to the Manual,[305] a requested instruction should be in writing. But the court-martial system does not provide for the waiver approach whenever there is a failure to request an instruction, unless it is minor in nature; on the contrary, the burden has been placed upon the law officer to assure that all reasonable instructions are given to the court. This field probably has been the greatest source of trouble for law officers. Court-Martial Reports are replete with cases which discuss instructions because they were either not given, or they were erroneously given. Due to automatic review and appellate procedures, together with the critical attitude of the Court of Military Appeals, the percentage of cases in which a petition for review has been granted by the latter may appear high. There is no need to review all cases here; it should suffice to say that the law officer is required to instruct as fully as a federal judge, probably more so in view of possible reversal on automatic review.

JUDGE AND DAW OFFICER COMMENTS ON EVIDENCE. Commenting on the evidence by the judge prior to the jury considering the verdict is permitted in a federal court. He can generally offer his opinion regarding the facts, the weight of evidence, and the guilt or innocence of the accused, provided the jury is clearly instructed that they are the sole triers of the facts;[306] not to do so is reversible error.[307] Any opinion he gives must be based on facts.[308] Improper comment by

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305 par. 73c., MCM, 1951
306 Wheatley v. United States, 159 F.2d 599 (4th Cir., 1946)
307 Petro v. United States, 210 F.2d 49 (6th Cir., 1954)
308 Quercia v. United States, 289 U. S. 466 (1935).

the judge is not necessarily cured, however, by instructing the jury that they are the only ones to determine the facts.[309] The judge is allowed considerable latitude,[310] but his remarks must be carefully guarded and not argumentative.[311] He should, in any comments he makes, state the evidence which is both favorable and unfavorable,[312] and not just the evidence of guilt.[313] He may comment on the weakness of certain evidence offered by the defendant.[314] The judge cannot take the issue of a fact from the jury,[315] nor can he instruct them to find a certain fact against the defendant.[316] The province of the jury is not invaded if instructed that the defendant is guilty if they find the facts to be those to which the government witnesses testified.[317] He may express an opinion of guilt but should do so only when the facts essential to the proof of guilt are undisputed.[318] The judge may, but is not required to, summarize the evidence;[319] he should charge the jury that they should consider all the evidence in the case;[320] he is not required to comment on every bit of evidence;[321] and if requested he should instruct the jury concerning the legal effect of

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309 Quercia v. United States, 289 U.S. 466 (1935)
310 Gowling v. United States, 64 F.2d 796 (6th Cir., 1933)
311 Callanan v. United States, 223, F.2d 171 (8th Cir., 1955)
312 Byford v. United States, 185 F.2d 171 (10th Cir., 1950)
313 Spalitto v. United States, 39 F.2d 782 (8th Cir., 1930)
314 Marino v. United States, 91 F.2d 691 (9th Cir., 1937)
315 Carothers v. United States, 161 F.2d 718 (5th Cir., 1947)
316 Fleischman v. United States, 174 F.2d 519 (D.C. Cir., 1949) rev. other gds., 339 U.S. 349
317 Hewitt v. United States, 110 F.2d 1 (D.C. Cir., 1940) cert. den., 310 U.S.641
318 Davis v. United States, 227 F.2d 568 (10th Cir., 1955)
319 Williams v. United States, 93 F.2d 685 (9th Cir., 1937)
320 Jackson v. United States, 181 F.2d 822 (6th Cir., 1950)
321 Todorow v. United States, 173 F.2d 439 (9th Cir., 1949) cert. den., 337 U.S. 925

certain evidence.[322] He does not pass to the jury issues of fact as to competency of evidence for their consideration of its admissibility prior to their judging its value.[323]

The military rule governing the law officer's comments and summarization of the evidence is contained in the Manual and appears in its text to incorporate the federal decisions as cited above.[324] The provision states:

> "In summarizing or commenting upon the evidence, the law officer should use the greatest caution to insure that his remarks do not extend beyond an accurate, fair, and dispassionate statement of what the evidence shows, both in behalf of the prosecution and the defense. He should not depart from the role of an impartial judge, or assume the role of a partisan advocate. He should not assume as true the existence or nonexistence of a material fact in issue as to which the evidence is conflicting, as to which there is dispute, or which is not supported by the evidence, and he should make it clear that the members of the court are left free to exercise their independent judgment as to the facts."

In several cases the U. S. Court of Military Appeals has closely scrutinized comments on the evidence by law officers. Instances where the law officer has characterized procedure as "gobbledygook" when endeavoring to end haggling over leading questions,[325] explained to the court members that he had determined there to be a prima facie case upon overruling a motion for a finding of not guilty,[326] commented upon the testimony of the accused that the latter's description of the method in which he used a knife amounted to a judicial confession of aggravated assault as a lesser included offense of that charged,[327]

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322 Jarabo v. United States, 158 F.2d 509 (1st Cir., 1946)
323 United States v. Dennis, 183 F.2d 201 (2d Cir., 1950)
324 par. 73c., MCM, 1951
325 United States v. Jackson, 3 USCMA 646, 14 CMR 64 (1954)
326 United States v. Miller, 6 USCMA 495, 20 CMR 211 (1955)
327 United States v. Berry, 6 USCMA 638, 20 CMR 354 (1956)

and in an instruction stated that the accused "may have been intoxicated" where there was evidence of drunkenness[328] are examples of cases reviewed and discussed, but not reversed. In all instances the reviewing court recognized the discretion of the law officer to comment on the evidence, provided the court members are clearly informed that they are the sole triers of fact. There can be no distortion, undue emphasis on selected evidence, or additions thereto.[329] In comparison with the federal judge, the law officer may likewise comment on evidence, but it appears that he may be more limited in how far he may go because of the U. S. Court of Military Appeals close watchfulness over the subject.

This concludes a review of powers exercised by the judge and the law officer during the trial of the issues. The next phase will be that concerned with powers they exercise after the verdict or the findings.

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328 United States v. Dunnahoe, 6 USCMA 745, 21 CMR 67 (1956)
329 United States v. Miller, 6 USCMA 495, 20 CMR 211 (1955)

CHAPTER V

COMPARISON OF POST TRIAL POWERS

Moving into the procedural area of those things that transpire after the verdict in a federal court or after the findings in a court-martial, further similarity is found. The judge in the federal court awaits a report from a court representative concerning the defendant after which he sentences him. In the court-martial, matter in aggravation, extenuation, or mitigation is heard, together with data of the accused's previous record, and then the court members assess the sentence. There are two areas in which the judge may act that can be of interest in the military: polling and a motion for a new trial.

POLLING. A jury may be polled in the federal courts. Under the Federal Rules of Criminal Procedure, Rule 31(d) restates the previous existing law.[330] The judge determines the manner in which the jury may be polled[331] and may hear the statements of jurors that the verdict as announced in court is not the same as the one upon which the jury decided.[332] However, the verdict of the jury cannot be impeached so as to show that it was gained in a particular manner, except to reveal corruption or outside influence.[333] If appropriate, a new trial may be granted in the discretion of the trial judge.[334]

Polling the court is unknown to military law.[335] The cited case states that the court acts as a unit and its decision is that of the

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330 Federal Code Annotated, Note of Advisory Committee, Rule 31

331 Shockley v. United States, 166 F.2d 704 (9th Cir., 1948) cert.den., 334 U.S.850

332 Young v. United States, 163 F.2d 187 (10th Cir., 1947) cert.den., 332 U.S. 770

333 Ibid.

334 United States v. Feinberg, 140 F.2d 592 (2d Cir., 1944) cert. den., 332, U.S. 726

335 ACM 6751, Tolbert, 14 CMR 613

unit rather than the individual members. It is believed that there is a more fundamental reason. In a jury trial, the jury votes to convict or acquit the defendant; in either event, the decision of the jury is unanimous. Provision is made for hung juries, if the jurors cannot agree. In a court-martial at least a two-thirds secret majority is needed to convict an accused;[336] only in the situation where the death sentence is mandatory is unanimous concurrence required.[337] As a result, the hung jury concept does not exist in the military. But, instead, there is sometimes the problem of senior officers influencing juniors on the court-martial. If the junior knew that he might be required to disclose his vote when the court was polled, he would be more reluctant to cast an independent and uninfluenced vote. This type of improper influence does not exist in the jury room, although personal influence or persuasion is usually present. Because of this possibility of seniority influence, the secrecy of the military ballot must be maintained. Two slight exceptions, if carefully and properly administered, may be possible. The first deviation may arise if the defense, upon conviction, desires to inquire from other court members, and particularly the junior member since he counts the votes,[338] if the announced finding coincides with that as decided by the court. This, of course, does not amount to a polling of the individual members as to how they voted. Another slight deviation might be allowable where there can be shown that the members of the court were influenced by outside interests. Otherwise, the vote of

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336 Art. 52(a)(2), UCMJ
337 Art. 52(a)(1), UCMJ
338 par. 74d(2), MCM, 1951

the individual court members should not be divulged.

NEW TRIAL. A new trial is a term employed by the federal courts and the military, but each have given it different meanings. In the appellate channels of the federal courts, the defendant may appeal to a circuit court of appeals or to the Supreme Court. Such an appeal is at his own expense. In contrast, the military offender may submit a brief for consideration by the convening authority when the latter takes his action on the record of trial;[339] in certain instances the case is considered by a board of review;[340] and thereafter he may petition the U. S. Court of Military Appeals for a review (mandatory in the case of a death sentence or in the case of a general officer).[341] All of this review may be without expense to the accused unless he elects to retain civilian counsel.

Because of the military appellate procedure, the term rehearing is used where directing a retrial of the case due to error committed at the original trial level. Consequently the term "new trial" in the military has been reserved for the limited statutory grounds of newly discovered evidence or fraud on the court whenever the sentence extends to severance from the service, death, or confinement for more than a year.[342]

In the federal courts, a new trial is requested by motion before the trial judge. In the interest of justice, it is within his discretion whether or not to grant the motion.[343] Based upon newly discovered

339 par. 48j(2), MCM, 1951
340 Art. 66, UCMJ
341 Art. 67, UCMJ
342 Art. 73, UCMJ
343 Federal Rules of Criminal Procedure, Rule 33

evidence, the defendant has within two years to file the motion; in all other cases, the motion must be filed within 5 days of the verdict or within such additional time as the judge may grant within the 5-day period.[344] A motion for a new trial predicated upon the evidence rests within the discretion of the trial judge,[345] and it must have been preceded by a motion for acquittal.[346] Although discovery of new evidence is specifically made a ground for a new trial by the Rules, its being granted is discretionary, reviewable only where prejudicially abused.[347] Ordinarily a new trial based upon newly discovered evidence will not be granted if the outcome of the new trial would not present a different result.[348] The disqualification of a juror usually is not enough;[349] however, the misconduct of a juror may be sufficient depending upon the discretion of the court.[350] Denial of a fair trial seems to be the test.

The military system has no counterpart and there do not appear to be any decisions where the law officer endeavored to follow the federal procedure. The reason for the lack of authority on this point is probably due to the Manual provision for filing a brief and the previously mentioned review channels without any expense. However, the

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344 Federal Rules of Criminal Procedure, Rule 33
345 Applebaum v. United States, 274 Fed. 43 (7th Cir.,1921) cert. den., 256 U.S. 704
346 Moore v. United States, 1 F.2d 839 (9th Cir., 1924) cert. den., 267 U. S. 593
347 Howell v. United States, 172 F.2d 213 (4th Cir., 1949) cert. den., 337 U.S. 906
348 Heald v. United States, 175 F.2d 878 (10th Cir., 1949) cert. den, 338 U.S. 859
349 Frazier v. United States, 335 U.S. 497 (1948)
350 United States v. Dressler, 112 F.2d 972 (7th Cir., 1940)

U. S. Court of Military Appeals has held that a trial does not end until the sentencing procedure has been completed, and that the law officer continues to rule on interlocutory questions until the trial ends.[351] Thus it may appear that the law officer can continue to act during the presentencing and sentencing procedure, but that his power wanes rapidly after the court has adjudged a sentence. This conclusion is reached, not because of the Code, but because the Manual does not specifically provide the court may exercise further power and because of the appellate avenue available. Therefore, in cases where the trial judge in the federal court normally grants a new trial, the military offender obtains similar relief by setting forth his reasons in an application to the reviewing authority for a rehearing. By whatever name it is called, the offender may receive another trial in either system.

May not a law officer at some future time be faced with a motion for a new trial? It is believed very possible; defense counsel would lose nothing by trying to interpose this motion and might well succeed if adequate grounds exist. Such a motion ought to be predicated upon Rule 33[352] rather than Article 73,[353] since the latter is so restrictive on the grounds for which a new trial may be granted and must be made through a petition to the Judge Advocate General.

A motion for a new trial would probably be received during the presentencing phase of the trial or even after the sentence has been announced, but before adjournment. Because of the law officer's loss

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351 United States v. Strand, 6 USCMA 297, 20 CMR 13 (1955)
352 Federal Rules of Criminal Procedure, Rule 33
353 Art. 73, UCMJ

of power after the adjournment and the lack of authority for a court to reconvene unless so directed by the convening authority, there is little likelihood that an accused would be able to make a motion for a new trial at that late date. However, there easily could be a Manual change so as to specifically allow for a law officer hearing a motion for a new trial after the court has adjourned as a federal judge does after the jury has been discharged. And for administrative as well as legal purposes, it might be considered a better procedural method than the present system of using affidavits to show the grounds for a rehearing when not already contained in the record of trial.

If the law officer were to receive a motion for a new trial during the presentencing part of the trial, what should be his action? For instance, assume that it is based upon the fact that someone overheard the trial counsel discussing the case with a court member while the court was considering the findings. Defense counsel could immediately ask that the court be reopened and move for either the disqualification of the member or move for a mistrial. Counsel would be unwise in following this method, because, particularly in a close case, he ought to hear the findings of the court first; after all, it might be that the accused would be acquitted, or the findings of guilty so reduced in degree of severity that the accused would benefit by not publicizing the misconduct of the court member. However, assuming the findings to be adverse, the defense might then move for a new trial under Rule 33.[354]

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354 Federal Rules of Criminal Procedure, Rule 33

The law officer should not then state that he does not have the power to grant a new trial. If he does, and it is ultimately determined he has the power, a rehearing probably would be required. His better procedure would be to hear evidence on the motion and then rule upon it. If he denies the motion, even though it is subsequently determined that he does not have such a power, no error has been committed because his ruling would have no effect. If he denies the motion with power to do so, his ruling probably would only be reviewable in the event he abused his discretion as is the rule in federal courts; if the discretion were abused, a rehearing would be necessary anyway because of the error.

If he decides to grant the motion for a new trial, the law officer will be, of course, acting without a precedent. But actually a motion for a new trial, because of the grounds upon which it may be predicated, is similar to a mistrial in certain respects; in others it is related to a motion for a finding of not guilty. Since the latter is sanctioned by statute[355] and the former by court decision,[356] there exists a strong implication that the law officer has authority to grant a new trial under Rule 33.[357] Any argument that he is without authority to assign the case to a new court for trial is without merit, for he is in the same position when he declares a mistrial.

Any request to the law officer or president of the court after adjournment that the court reconvene for the purpose of hearing a

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355 Art. 51, UCMJ
356 United States v. Stringer, 5 USCMA 122, 17 CMR 122 (1954)
357 Federal Rules of Criminal Procedure, Rule 33

motion for a new trial probably does not present much of a problem, particularly after the five-day period specified in Rule 33.[358] As previously stated, it may be administratively advisable for a convening authority to make provision for this procedure rather than depend upon affidavits. If such a method were used, there would be no need for the presence of the court members; their absence would be similar to that discussed previously in connection with hearings before trial regarding motions. But in view of appellate procedures, it probably is not wise for this practice to be adopted without Manual sanction.

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358 Federal Rules of Criminal Procedure, Rule 33

CHAPTER VI

CONCLUSIONS

A federal judge had broad powers during a criminal trial as compared with those of a law officer when the Uniform Code of Military Justice came into being. The disparity between the two has been narrowed tremendously by the U. S. Court of Military Appeals; however, its decisions in some instances have utilized language and terminology casting doubt as to the status of the law in several areas. Had the Court been more specific or definitive in its opinions, many of the existing problems would not be unsolved; had the Court set forth the law to be followed in a particular field rather than decide limited issues with broad implications, undecided facets would not be prevalent.

There are quite a number of areas which a law officer may yet explore. Bringing them to the fore may require time due to law officers not being aggressive; if one is over-zealous without the sanction of his superiors, he will be subject to criticism. To gain progress, a staff judge advocate or legal officer must convince his convening authority that the law officer of their general court-martial must be allowed to use his own judgment in proceeding under the federal rules and decisions.

Experimentation should only be done by a law officer in those cases where the number of expected witnesses is few, so that there will be a minimum of inconvenience if a rehearing is required. The usual trial for absence may be the proper place. As long as all the rights which are guaranteed by either the Constitution, the Code, or

the Manual are protected, the accused should have little cause to complain, especially when following rules which govern his counterpart in the federal district court. There now follows a recapitulation of those discussed areas where a law officer may have latent or different powers which could permit his acting otherwise than he has in the past.

Initially the law officer has almost no power before the court convenes in a particular case because of its being of such limited and special jurisdiction; but after its first meeting, he controls the trial except for a few minor duties of the president. As for the first meeting of the court, there has been suggested that general courts-martial proceed similarly to federal courts at the outset by use of the federal pretrial hearing. This pretrial should not be confused with the military pretrial investigation which is conducted before the case is referred to trial. Preliminary court work may then be accomplished without the presence of the court members. The plan would be subject to defeat only if counsel or the law officer were challenged for cause so as to raise a factual issue for the court members to decide. Otherwise, the pretrial might proceed through the arraignment, hearing of motions, and the pleas. There would be needed a change as to who would administer oaths to counsel, but that deviates only from the Manual and not the Code. Although not so useful in those commands ordering general courts-martial rather infrequently, it would materially aid those with a large volume of trials. For instance, Mondays could be reserved to hear pretrials of those cases expected to reach trial during the week, or to ask for special relief such as a continuance. Possibly the entire day might be

consumed with these pretrials. Thus, at least five, and usually more, man-days would be saved through the absence of the court members. If they served any useful purpose during this part of the trial, the present system would be preferable; but they don't. In doubt, of course, is the legality of so proceeding without Manual authorization and in view of the present trial guide set forth therein. To be noted, however, is the fact that the Manual procedure is termed a guide.

Since the power of the law officer is quite similar to that of a federal judge in many areas, there is no need to review them in detail. In general, they relate to motions for discovery, severance, a bill of particulars, a continuance, and a mistrial, as well as the ordering the taking of depositions, the issuance of a subpoena, the treatment of witnesses, and comments regarding the evidence.

In doubt is the exact role which law officers play in respect to motions raising defenses and objections to trial. Where only a question of law is raised on uncontroverted facts, there is no problem, because the law officer may rule finally without submitting any portion of the controversy to the court. But where factual issues are involved, the area becomes cloudy. Certainly, where there is a fact in issue which goes to the guilt or innocence of the accused, he is entitled to have that fact considered by the court; and the law officer cannot deprive him of this right by ruling on the motion. Although he may make his ruling, he must also submit the factual issue to the court for its determination. Going further, certain defenses may have factual issues to be decided which affect the defense but do not touch upon guilt or innocence. In other words, the fact may bear

on a bar to trial rather than guilt or innocence of the offense. It is here concluded it is immaterial which one of the two is affected, and the same rule applies to both. Until the law is more settled, it will be well for law officers to consider the rule so applying. Even though it is a detraction from his powers, submitting the contested facts to the court for its determination will be safer.

The law officer may have the power to order the search and seizure of property within the confines of a military installation. If so ordered by him during the course of a trial, it probably would not be illegal; however, administratively it would be more practical to refer the request to the convening authority.

Suppression of evidence has not been directed heretofore by law officers, probably because of the Manual provision against it. However, there is authority for this type of a motion in the federal courts. The mere fact that there is opportunity for objection to illegally seized property when offered in evidence, the reason stated in the Manual as to why the motion is not allowed, appears weak in logic, because there also exists the same opportunity to object during the trial in a federal court. If the federal pretrial system were to be adopted, there would be all the more reason for allowing this motion to be made. Danger lies in the law officer stating he is powerless to hear the motion because of the Manual; he is in a better position if he rules upon it, even though the only action he takes is to defer his ruling until the trial. It could not then be said on review that he failed to exercise a power which he possessed notwithstanding the Manual provision; and the accused could not complain on review if the

law officer rules on the motion to suppress because the procedure had been followed at his request.

As the federal judge must do, the law officer is required to see that the accused has a fair trial. It must be a public one with a few minor exceptions. Even closing the trial while hearing evidence classified for security purposes may become subject to criticism.

The law officer's ruling on challenges prior to arraignment remains in doubt. It is believed that the law officer may be able to excuse from sitting anyone who clearly should not be connected with the trial. In this respect he would not be ruling upon the challenge, but would be excusing the person for cause due to being disqualified. If there is, of course, a factual issue to be determined, the matter should be allowed to go to the court for its decision. After arraignment, it has been held harmless error for the law officer to excuse a member for cause subject to the objection of the court. In view of the harmless error involved, law officers possibly should be forehanded by using this device to preclude an erroneous ruling by the court on a challenge.

As for the law officer disqualifying himself as a federal judge may, there is no military precedent. He may disclose the grounds in general terms and hope to be challenged successfully; but there does not seem to be any reason why he could not disqualify himself like the federal judge.

Changing venue under a motion for appropriate relief may possibly be a power which the law officer could exercise. Similarly to a mistrial where he is not able to refer the case to another court, in

a change of venue the law officer is not able to refer the case to another jurisdiction. Action on such a motion would have to be correlated by the law officer's convening authority with another convening authority. From a practical viewpoint, the law officer could grant an extended continuance to allow opportunity for the antagonistic sentiment to subside. It would also give opportunity for a further consideration by the convening authority of changing the place of trial.

In regard to contempts, the law officer may have greater power than outlined in the Manual. Except for the latter, it would appear that he should have the power to hold an individual in contempt without referring the issue to the court members, since it is an interlocutory question. However, without a change to the Manual, the legality of a law officer's determination of a contempt may be dubious.

Polling the court members is rightly prohibited. But there may be a place for the law officer permitting an inquiry of other members as to whether or not the announced finding represented the true vote of the court. In connection with the findings, the law officer should permit inquiry as to undue influence by other court members or by outside interests, particularly when such inquiry is based upon reliable information.

A motion for a new trial or rehearing is one which has not been considered by reviewing authorities. Its use could develop into a helpful vehicle for considering matter becoming known after the findings, which presently requires the filing of affidavits to support a rehearing. If a method akin to that prescribed by the federal procedure were used, the law officer's power could thus be extended beyond the

adjournment of the court to process such a motion. Courts-martial would then more approximate federal procedure in this respect.

Finally, there are a few additional observations which have resulted from this study. Firstly, it is believed that all officers engaged in military justice should study the Federal Rules of Criminal Procedure for a better understanding of some Code provisions and more particularly the Manual provisions. Law officers certainly should be acquainted with the Rules so as to preclude their being surprised by motions unfamiliar in the military but recognized in the district courts. Secondly, every law officer should be equipped with a copy of Title 18, U. S. Code Annotated containing the Federal Rules of Criminal Procedure and a good text on the same subject. Volumes 11 and 12, Cyclopedia of Federal Procedure (3d Edition) published by Callaghan and Company, for instance, was used extensively in this study. Third and lastly, the U. S. Court of Military Appeals, from appearance at least, tends to scrutinize the conduct of law officers and may import misconduct without knowing all the facts; such a determination does not necessarily serve the ends of justice. To obtain the latter, both the accused and the government should receive a fair trial. Law officers can materially raise their prestige in the eyes of the U. S. Court of Military Appeals. By doing so, the Court in time should recognize that the law officer merely exercised his discretion as would a judge under similar circumstances and under the factual situation known to him at the time. Consequently, there should result greater faith in the law officer, and it is up to him to instill it.

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